

The Right to a Jury Decision on Questions of Fact
Under the Seventh Amendment

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In a series of decisions over the last decade, the Supreme Court has reconsidered an aspect of the Seventh Amendment that has been long overlooked: the allocation of particular questions to the judge or the jury in a case where the right to a jury trial applies. Breaking with historical practice, the Court has emphasized considerations other than the fact-law distinction as a basis for identifying the questions that must go to the jury. Most prominently, in Markman v. Westview Instruments, Inc., the Court focused on "functional considerations" in assigning a question of patent claim construction to the judge. In this Article, the author critiques the Court's recent Seventh Amendment jurisprudence, arguing that the Seventh Amendment compels courts to assign questions of fact to the jury. The author then proposes a test for identifying questions of fact based on the types of inferences required to answer a particular question. Under this test, questions requiring inductive inferences about the transactions or occurrences in dispute are "fact" questions, which must be decided by the jury in appropriate cases. All other questions may permissibly be answered by the judge. The author applies this test to the Court's recent decisions to show how an inferential understanding of the fact-law distinction can help resolve the most difficult issues of decisional responsibility.

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Ad quæstionem facti non respondent iudices . . .

*ad quæstionem juris non respondent juratores.*¹

I. INTRODUCTION

The Seventh Amendment provides that "[i]n [s]uits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."² Because of its cryptic reference to the "preservation" of an undefined right of trial by jury, the Seventh Amendment has produced a number of persistent disputes. These disputes involve four basic issues: (1) the features that a civil jury must possess to satisfy the Amendment; (2) the causes of action that trigger the jury right; (3) the questions that the jury must decide once the right is triggered; and (4) the extent to which the Amendment proscribes changes in adjudicative procedure.

Of these, the first, second, and fourth have received considerable judicial and academic scrutiny, and basic parameters have emerged. For example, in regard to the first issue, the Supreme Court has held that juries may consist of as few as six

¹ 3 SIR EDWARD COKE, COMMENTARY ON LITTLETON 460 (J. H. Thomas ed., 1818) "Judges do not answer questions of fact; juries do not answer questions of law." *Id.*

² U.S. CONST. amend. VII.

persons,³ but that those persons must be selected from a cross-section of the community.⁴ On the issue of whether a cause of action triggers the jury right, the Court has developed a widely criticized but entrenched test focusing on whether the cause of action is more analogous to an action recognized at law at the time of the passage of the Amendment or to an equitable or admiralty action at that time.⁵ On the fourth issue, the Court has generally allowed procedural innovations empowering both trial and appellate judges to decide cases as a matter of law,⁶ while at the same time barring the early disposition of equitable claims by judges where those dispositions could have preclusive effect on related legal claims to which a jury right applies.⁷

The third issue, involving the questions the jury must decide, has received more ambiguous treatment. As a historical matter, courts in both England and the United States have generally assumed that the jury's primary function is to decide

³ *Colgrove v. Battin*, 413 U.S. 149, 160 (1973). The Court has never reached the question of whether civil juries may consist of fewer than six persons, apparently because no federal district court has attempted to implement such a reduction. The Court has held, however, that a state may not convict a criminal defendant based on the unanimous vote of a jury of fewer than six persons. See *Ballew v. Georgia*, 435 U.S. 223, 239 (1978).

⁴ *Thiel v. S. Pac. Co.*, 328 U.S. 217, 220 (1946). Congress later codified the requirement of cross-sectional representation in the Jury Selection and Service Act of 1968. See 28 U.S.C. §§ 1861–69.

⁵ See, e.g., *Tull v. United States*, 481 U.S. 412, 417 (1987) (“To determine whether a statutory action is more similar to cases that were tried in courts of law than to suits tried in courts of equity or admiralty, the Court must examine both the nature of the action and of [sic] the remedy sought.”). The Court typically asks first whether the nature of the cause of action resembles a legal or equitable cause of action, and if that inquiry is inconclusive, the Court asks whether the remedy sought resembles a legal or an equitable remedy. In a separate line of cases, the Court has also held the Seventh Amendment inapplicable where Congress has statutorily created public rights enforceable in non-Article III tribunals. See Margaret L. Moses, *What the Jury Must Hear: The Supreme Court's Evolving Seventh Amendment Jurisprudence*, 68 GEO. WASH. L. REV. 183, 212–16 (2000).

⁶ See *Galloway v. United States*, 319 U.S. 372, 372 (1943) (holding that a grant of a directed verdict does not violate the Seventh Amendment); *Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 655 (1935) (holding that an appellate court may dismiss an action on the merits where it finds evidence insufficient as a matter of law); *Fid. & Deposit Co. of Md. v. United States*, 187 U.S. 315, 322 (1902) (holding that a grant of judgment for the plaintiff based on the defendant's failure to comply with pleading requirements did not violate the Seventh Amendment).

⁷ See *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 508–09 (1959) (holding that where both a declaratory judgment and an injunction are sought, a judge may not preemptively decide factual issues as part of an injunction claim); *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 479 (1962) (holding that where an action involves both legal and equitable claims, common factual issues must be decided by jury); cf. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 333–37 (1979) (holding that a plaintiff's use of offensive collateral estoppel in a legal action based on an earlier equitable action did not violate the Seventh Amendment).

questions of fact, while judges may permissibly decide questions of law.⁸ The Seventh Amendment's text and relevant statutory provisions suggest that the amendment incorporates this basic division of responsibility, and a number of older Supreme Court opinions seem to concur. But until recently, the Court had seldom explored in any depth the assignment of particular questions to the judge or the jury. That changed with four cases decided between 1987 and 1999: *Tull v. United States*,⁹ *Markman v. Westview Instruments, Inc.*,¹⁰ *Feltner v. Columbia Pictures Television, Inc.*,¹¹ and *City of Monterey v. Del Monte Dunes, Ltd.*¹² Reflecting the general consensus dismissing the fact-law distinction as camouflage for the normative conclusion that a question should go to the judge or to the jury,¹³ the Court's analyses in these cases avoided reference to the fact-law distinction as a basis for decision. Instead, the Court invoked a variety of other

⁸ See COKE, *supra* note 1. Despite Lord Coke's rigid pronouncement that judges do not decide questions of fact and juries do not decide questions of law, *see id.*, until the latter half of the nineteenth century courts did not automatically assign questions of fact to the jury and questions of law to the judge. "Prior to 1850, the judge and jury were viewed as partners in many jurisdictions. The jury could decide questions of both law and fact, and the judge helped guide that decision-making process by comments on the witnesses and the evidence." JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE 496 (3d ed. 1999); *see also* 9A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE: CIVIL 2d § 2503, at 156 (1995). The role of the jury has been described as follows:

Some of the most famous students of the judicial process have argued that one of the purposes of the jury system is to permit the jury to temper strict rules of law by the demands and necessities of substantial justice and changing social conditions, thereby adding a much needed element of flexibility.

Id.

⁹ 481 U.S. 412 (1987).

¹⁰ 517 U.S. 370 (1996).

¹¹ 523 U.S. 340 (1998).

¹² 526 U.S. 687 (1999).

¹³ *See* LON L. FULLER & MELVIN ARON EISENBERG, BASIC CONTRACT LAW 593 (6th ed. 1996). This normative determination has been explained in the following manner:

It is commonly said that questions of fact are for the jury and questions of law are for the judge. A more realistic analysis would be that questions the legal system assigns to the jury are called "questions of fact," and questions the legal system assigns to the judge are called "questions of law."

Id.; *see also* 21 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE & PROCEDURE: EVIDENCE § 5052, at 249 (1977) ("[J]udges decide many questions of fact, just as the jury can decide many questions of law, and therefore the law-fact dichotomy is a poor basis for allocating functions between them."); Ronald J. Allen & Michael S. Pardo, *Facts in Law and Facts of Law*, 7 INT'L J. EVID. & PROOF 153, 155 (2003) (describing the fact-law distinction as "artificial and notoriously problematic").

criteria, such as historical antecedents,¹⁴ common-law analogies,¹⁵ and “functional considerations.”¹⁶

Unfortunately, however, the Court’s resort to criteria other than the fact-law distinction failed to produce a coherent body of law. Indeed, the cases seem to conflict on critical points. For example, where *Tull v. United States*¹⁷ holds that the judge may decide on the imposition of a civil penalty under the Clean Water Act, *Feltner v. Columbia Pictures Television, Inc.*¹⁸ holds that the jury must decide on the imposition of statutory damages under the Copyright Act.¹⁹ And where *Markman* applies a “functional” test focusing on the relative competencies of judge and jury to find that the Seventh Amendment does not require a jury decision on the construction of a patent,²⁰ *City of Monterey v. Del Monte Dunes, Ltd.*²¹ applies a “functional” test focusing on the nature of the issue to be resolved to find that the Seventh Amendment does require a jury decision on the takings issue in an inverse condemnation case.²²

These cases—especially *Markman*—have provoked significant scholarly reaction.²³ Most of the commentary has centered on policy-based critiques of *Markman*. One of the few scholars to address the cases more generally, Professor Margaret Moses, has attempted to make sense of the cases by relating them to one

¹⁴ See *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 379–83 (1996) (engaging in an extensive but inconclusive historical analysis to determine whether a jury must interpret patent claims); *Tull v. United States*, 481 U.S. 412, 426 n.9 (1987) (denying the right to a jury decision on a civil penalty because of a lack of evidence that “the Framers meant to extend the right to a jury to the remedy phase of a civil trial”).

¹⁵ See *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 347–53 (1998) (emphasizing the “legal” nature of copyright claims in determining that a jury must determine statutory damages in a copyright action).

¹⁶ See *Markman*, 517 U.S. at 384, 388–90 (considering “relative interpretive skills of judges and juries” and finding judges better suited to interpret patent claims).

¹⁷ 481 U.S. 412 (1987).

¹⁸ 523 U.S. 340 (1998).

¹⁹ *Id.*

²⁰ *Markman*, 517 U.S. at 388–90.

²¹ 526 U.S. 687 (1999).

²² *Id.* at 720–21.

²³ See, e.g., John R. Lane & Christine A. Pepe, *Living Before, Through, and With Markman: Claim Construction as a Matter of Law*, 1 BUFF. INTELL. PROP. L.J. 59 (2001); Scott A. Lund, *Patent Infringement and the Role of Judge and Jury in Light of Markman and Hilton Davis*, 21 IOWA J. CORP. L. 627 (1996); David B. Pieper, *The Appropriate Judicial Actor for Patent Interpretation: A Commentary on the Supreme Court’s Decision in Markman v. Westview Instruments, Inc.*, 51 ARK. L. REV. 159 (1998).

or more of four “strands” of Seventh Amendment jurisprudence.²⁴ In this Article, I will take a different approach. I will argue that the Supreme Court has too easily dismissed the fact-law distinction as a basis for allocating decisional responsibility between judge and jury under the Seventh Amendment. If a consistent basis exists to identify questions of fact, both constitutional text and precedent suggest it should be used to identify the questions the jury must decide. I will argue that such a basis exists, rooted in the types of inferences required to answer a given question. The questions that judges call questions of fact, in other words, are those questions calling for inductive inferences about the transactions or occurrences in dispute in the litigation. The questions that judges call questions of law are those questions calling for either deductive inferences or inductive inferences leading to conclusions beyond the transactions or occurrences in dispute. Furthermore, I will argue that the Court has already implicitly adopted this understanding of the fact-law distinction in its most recent Seventh Amendment decision, *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*²⁵

In order to avoid the intractable linguistic and epistemological problems that would beset any attempt to distinguish “facts” from “laws,” my analysis focuses entirely on questions. Rather than attempting to categorize real-world phenomena, I will attempt to categorize questions, by reference both to the type of logic needed to answer them and the subject matter of the inferences involved. I then use the fact-law terminology to label the categories, with questions calling for inductive inferences on certain topics labeled “fact questions” and questions calling for inductive inferences on other topics and for deductive inferences labeled “law questions.” I hope to show that, whether they realize it or not, this is what judges naturally do. This is a descriptive claim. Having made it, I will make a normative claim that judges *should* assign decisional responsibility based on the types of inferences required to answer a question.

My argument will proceed in four steps. First, in Part II, I will filter out certain “screening” functions performed by the judge that do not implicate the Seventh Amendment. The questions addressed in this “screening” role, although conventionally referred to as matters of “law,” form a discrete class of questions

²⁴ See Moses, *supra* note 5, at 183. Professor Moses distinguishes the following “strands:”

[F]irst, the historical test of the right to a jury trial . . . ; second, the preservation of the “substance” of the jury trial right, as opposed to mere matters of pleading and practice; third, the preservation of the jury right after law and equity courts were merged in 1938; and fourth, the creation of an exception to the Seventh Amendment guarantee for matters which Congress has delegated for decision to non-Article III courts and administrative agencies.

Id. at 183. She argues that *Markman* is an aberration best understood as an extension, in connection with the fourth strand, of the Court’s deference to specialized courts in dealing with statutorily created public rights. *Id.* at 231–35.

²⁵ 532 U.S. 424 (2001).

with factual characteristics that must be removed to understand which "fact" questions must go to the jury. Next, in Part III, the heart of the analysis, I will investigate the fact-law distinction from an inferential perspective. I will begin by explaining the categories of inductive and deductive reasoning and showing how those types of inferences arise in adjudication. I will then show how considerations of the inferences a question requires animate the fact-law distinction in practice by dissecting several important common-law questions. Finally, in Part IV, I will critique the Supreme Court's recent Seventh Amendment opinions to show how an inferential understanding of the fact-law distinction can guide the allocation of decisional responsibility in real cases.

By concentrating on establishing a baseline for allocating decisional responsibility consistent with Seventh Amendment prescriptions, I circumscribe my analysis in several important respects. First, I consider only civil litigation. The combination of a more forceful jury guarantee in the Sixth Amendment²⁶ and the prohibition of double jeopardy in the Fifth Amendment²⁷ produces very different conditions on the jury right in criminal cases. While the criteria I discuss may have value in the criminal context, for example in allocating decisions between the liability and penalty phases, the treatment of those issues exceeds the scope of this work. Second, I avoid consideration of the normative justifications for the right to a civil jury trial. A debate rages over the utility of the civil jury.²⁸ Rather than take up that debate, I accept the Seventh Amendment as a societal affirmation of the value of the civil jury and offer a way to effect the jury right that is both logically consistent and in harmony with the language and interpretation of the Amendment.

II. THE SEVENTH AMENDMENT'S EVOLVING JURISPRUDENCE

For centuries, the black-letter rule of the common law has been that juries decide questions of fact and judges decide questions of law.²⁹ While the Seventh

²⁶ U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . .").

²⁷ U.S. CONST. amend. V ("No person shall be . . . subject for the same offence to be twice put in jeopardy of life or limb . . ."). The prohibition on double jeopardy precludes the judge from overturning a verdict for the defendant, thereby making jury nullification a possibility in criminal cases.

²⁸ See generally VERDICT: ASSESSING THE CIVIL JURY SYSTEM (Robert E. Litan ed., 1993) (containing a collection of articles by major scholars critiquing the civil jury system).

²⁹ In reality, through the first half of the nineteenth century it was widely assumed that juries had inherent power to decide both questions of law and questions of fact. See Paul D. Carrington, *The Seventh Amendment: Some Bicentennial Reflections*, 1990 U. CHI. LEGAL F. 33, 44 (1990) ("For much of the century following ratification of the Amendment, federal civil

Amendment does not expressly assign all questions of fact to the jury and all questions of law to the judge,³⁰ it fits within that historical framework. The text of the Amendment and relevant statutory provisions from the same time period strongly suggest that a key feature of the jury right was the reservation of factual decisions for the jury. Until recently, the Supreme Court's Seventh Amendment decisions seemed to accept that idea implicitly. More recent decisions, however, have focused on other considerations in allocating decisional responsibility. In this Section, I trace this evolution through the Court's most recent cases.

A. Textual, Statutory, and Case Law Support for Assigning Questions of Fact to the Jury

The Seventh Amendment expressly refers to "facts" in its second clause, the "re-examination clause."³¹ Motivated by the fear that the federal appellate jurisdiction provided in Article III of the Constitution would allow creditors to overturn local jury verdicts favorable to debtors,³² the re-examination clause provides that "no fact tried by a jury shall be otherwise re-examined . . . than according to the rules of the common law."³³ While this clause says nothing

juries were told that they were responsible for deciding law as well as fact, giving such attention as they might choose to the judge's instructions on the law.").

³⁰ Evidence from the historical record suggests that the drafters and ratifiers of the Amendment saw it as a general injunction against the curtailment of civil juries, and not as an instruction manual for allocating decisional responsibility. See Edith Guild Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289, 290 (1966). Ms. Henderson stated:

Nowhere in the history of the Philadelphia convention, the ratifying conventions of the several states, or the specific 'legislative history' of the Bill of Rights can any evidence be found that the relation of judge to jury was considered as affected in any but the most general possible way by the seventh amendment, or even that it was considered at all.

Id.

³¹ U.S. CONST. amend. VII.

³² See Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 673-74 (1973). Professor Wolfram explained:

One cannot read through Jonathan Elliot's collection of debates in the state ratification conventions without being struck by the repeated connection made by antifederalist speakers . . . between the right of jury trial in civil cases and the plight of debtors who would be required to defend debt actions in the new federal courts . . .

Id. Professor Wolfram quotes from the Virginia ratification debates in which Patrick Henry railed against the Supreme Court's apparent power to hear appeals from factual questions under Article III. *Id.* at 688-89.

³³ U.S. CONST. amend. VII.

about what other questions may go to the jury, it suggests that questions of fact were understood to be peculiarly the jury's province.

The Judiciary Act enacted by the first Congress supports that interpretation.³⁴ It provided that "the trial of issues in fact, in the district courts, in all causes except civil causes of admiralty and maritime jurisdiction, shall be by jury."³⁵ Although its passage preceded the ratification of the Seventh Amendment, the Judiciary Act provides a window into the procedural mindset of the first Congress, which comprised many of the men who subsequently participated in the drafting and ratification of the Bill of Rights.³⁶ Those men would not have created a constitutional right to a jury trial significantly different from the jury guarantee they had imposed on federal trial courts by statute just two years earlier.³⁷

The Supreme Court, until its recent cases, rarely faced directly the question of whether the judge or the jury should decide a particular question. Nevertheless, the Court's decisions generally affirmed that it is the jury's prerogative to decide questions of fact. In its 1897 decision in *Walker v. New Mexico & Southern Pacific Railroad Co.*,³⁸ the Court concluded that the aim of the Seventh Amendment "[i]s not to preserve mere matters of form and procedure but substance of right. *This requires that questions of fact in common law actions shall be settled by a jury*, and that the court shall not assume directly or indirectly to take from the jury or to itself such prerogative."³⁹

The Court struck a similar note in *Ex parte Peterson*,⁴⁰ in which the Court approved tentative fact-finding by an auditor, but stated that "[t]he limitation imposed by the Amendment is merely that enjoyment of the right of trial by jury be not obstructed, and that *the ultimate determination of issues of fact by the jury*

³⁴ See Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77 (1789).

³⁵ *Id.*

³⁶ See FRIEDENTHAL ET AL., *supra* note 8, at 11 ("The 1789 Judiciary Act . . . is significant because it is the first and most authoritative expression of congressional understanding of Article III.") (citation omitted).

³⁷ The current Judicial Code and Federal Rules of Civil Procedure also support the notion that the determination of fact issues lies at the core of the jury right. Although the Judicial Code no longer contains a provision expressly assigning questions of fact to the jury, it does provide that in the unusual case of an original action in the Supreme Court against a citizen of the United States, "issues of fact shall be tried by a jury." 28 U.S.C. § 1872 ("In all original actions at law in the Supreme Court against citizens of the United States, issues of fact shall be tried by a jury."). Federal Rule of Civil Procedure 38, the basic rule providing for jury trial in federal district courts, provides that, where one party demands a jury trial on only some issues, the other party may demand a jury trial on "all of the issues of fact in the action." FED. R. CIV. P. 38(c).

³⁸ 165 U.S. 593 (1897).

³⁹ *Walker v. N.M. & S. Pac. R.R. Co.*, 165 U.S. 593, 596 (1897) (emphasis added) (holding that where a jury's interrogatory answers conflicted with a general verdict, the trial judge could permissibly enter judgment consistent with interrogatory answers).

⁴⁰ 253 U.S. 300 (1920).

be not interfered with.”⁴¹ And in *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*,⁴² the Court declared that “[a]n essential characteristic of [the federal] system is the manner in which, in civil common-law actions, it distributes trial functions between judge and jury and, under the influence—if not the command—of the Seventh Amendment, assigns the decisions of disputed questions of fact to the jury.”⁴³

Thus, common-law notions about the responsibilities of judges and juries, the text of the Seventh Amendment, the original Judiciary Act, and Supreme Court cases interpreting the Seventh Amendment all link the jury’s role to deciding questions of fact. Despite this long tradition, however, as it has addressed a number of cases involving issues of decisional allocation in recent years, the Court has turned away from the fact-law distinction and focused on other considerations.

B. The Supreme Court’s Recent Seventh Amendment Decisions

1. *Tull v. United States*

The case that begins the Court’s new Seventh Amendment jurisprudence is *Tull v. United States*,⁴⁴ decided in 1987. The federal government sued Tull, a real estate developer, for dumping fill on wetlands in violation of the Clean Water Act.⁴⁵ The government sought both an injunction and civil penalties under the provision of the Act subjecting violators to “a civil penalty of not to exceed \$10,000 per day”⁴⁶ during the period of the violation.⁴⁷ Tull’s demand for a jury trial was denied by the district court judge.⁴⁸ After a bench trial, the judge found that Tull had illegally filled in wetland areas and imposed \$325,000 in civil penalties, plus an injunction ordering the removal of fill and restoration of the properties still owned by Tull. Tull appealed, arguing that he was entitled to a jury

⁴¹ Ex parte Peterson, 253 U.S. 300, 310 (1920) (emphasis added).

⁴² 356 U.S. 525 (1958).

⁴³ *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525, 537 (1958) (emphasis added) (citations omitted); see also *Dimick v. Shiedt*, 293 U.S. 474, 486 (1935) (“The controlling distinction between the power of the court and that of the jury is that the former is the power to determine the law and the latter to determine the facts.”); *Gasoline Prods. Co. v. Champlin Ref. Co.*, 283 U.S. 494, 498 (1931) (“All of vital significance in trial by jury is that issues of fact be submitted for determination . . .”).

⁴⁴ 481 U.S. 412 (1987).

⁴⁵ *Tull v. United States*, 481 U.S. 412, 414 (1987); see 33 U.S.C. §§ 1311, 1344, & 1362(7) (prohibiting the discharge of fill material into navigable waters and adjacent wetlands).

⁴⁶ See 33 U.S.C. § 1319(d).

⁴⁷ *Tull*, 481 U.S. at 414–15.

⁴⁸ *Id.* at 415.

trial under the Seventh Amendment. The Fourth Circuit affirmed, finding that, because the district court imposed “a ‘package of remedies’ containing both equitable and legal relief with ‘one part of the package affecting assessment of the others,’” the action could not be considered one at law, to which the Seventh Amendment jury right would apply.⁴⁹

The Supreme Court first addressed the basic question of whether some jury right applied. The Court employed a fairly standard version of its historical test, considering both the nature of the cause of action and the remedy sought.⁵⁰ Based primarily on its conclusion that civil penalties are most closely analogous to punitive damages, which were available only in a court of law,⁵¹ the Court held that *Tull* had a right to a jury trial on at least some issues.⁵²

Next, the Court considered whether that right extended to the assessment of the civil penalties. Its analysis of that question was brief and essentially conclusory. The Court found that the Seventh Amendment operates to preserve “[o]nly those incidents which are regarded as fundamental, as inherent in and of the essence of the system of trial by jury”⁵³ The Court concluded that, because Congress has the power to fix civil penalties statutorily, the assessment of civil penalties is not a “fundamental element of a jury trial.”⁵⁴ Therefore, the Court reasoned, Congress may appropriately delegate that responsibility to judges.⁵⁵

Tull marks an important shift because the Court for the first time expressly separated out the two different jury-right questions: first, the Court analyzed whether there is any right to a jury, and then it asked whether a specific question must be decided by the jury. *Tull* is also important because it does not talk about the jury’s function in terms of deciding questions of fact. Still, the Court’s focus

⁴⁹ *Id.* at 416 (quoting *Tull v. United States*, 769 F.2d 182, 187 (4th Cir. 1985)).

⁵⁰ *Id.* at 417 (“To determine whether a statutory action is more similar to cases that were tried in courts of law than to suits tried in courts of equity or admiralty, the Court must examine both the nature of the action and of [sic] the remedy sought.”).

⁵¹ *Id.* at 423.

⁵² *Id.* at 424–25. The Court rejected the appellate court’s rationale for calling the entire remedy equitable. “[I]f a legal claim is joined with an equitable claim, the right to jury trial on the legal claim, including all issues common to both claims, remains intact. The right cannot be abridged by characterizing the legal claim as ‘incidental’ to the equitable relief sought.” *Id.* at 425 (quoting *Curtis v. Loether*, 415 U.S. 189, 196 n.11 (1974)).

⁵³ *Tull v. United States*, 481 U.S. 412, 426 (1987) (quoting *Colgrove v. Battin*, 413 U.S. 149, 156 n.11 (1973)).

⁵⁴ *Id.*

⁵⁵ *Id.* at 426–27. Justice Scalia, joined by Justice Stevens, dissented. He pointed out that, while Congress could choose to create a statutory cause of action with a fixed recovery, it did not do so in this case. *Id.* at 427 (Scalia, J., dissenting). Instead, it provided for a recovery very similar to a punitive damage award, to be assessed on a case-by-case basis. Scalia argued that, just as punitive damages are typically assessed by a jury, this civil penalty should be assessed by the jury. *Id.* at 428 (Scalia, J., dissenting).

on “incidents fundamental” to the jury right arguably incorporates the notion that juries must decide questions of fact. In subsequent decisions, however, the Court seemed to move further away from that position.

2. *Markman v. Westview Instruments, Inc.*

After *Tull*, almost a decade passed before the Court again considered the allocation of decisional responsibility under the Seventh Amendment. But its next decision, in *Markman v. Westview Instruments, Inc.*,⁵⁶ brought on a flurry of decisions on the subject. *Markman* has been widely critiqued and criticized for its impact on patent litigation. On a more general level, though, it has become the leading opinion governing the roles of judge and jury under the Seventh Amendment. It is, therefore, especially significant for this analysis.

Markman involved a patent infringement claim relating to a dry-cleaning inventory control system.⁵⁷ The distinguishing feature of the plaintiff Markman’s system was its ability to monitor inventory throughout the cleaning process and generate reports about an item’s location and status.⁵⁸ Westview developed a product that recorded an inventory of receivables, but did not track and record the actual items of clothing.⁵⁹ Markman brought suit for patent infringement. The case was tried to a jury, which returned a verdict for Markman. Westview moved for judgment as a matter of law, arguing that the term “inventory” in the claims in Markman’s patent encompassed both cash inventory and actual items of clothing.⁶⁰ Since Westview’s product did not track items of clothing, Westview argued, it did not infringe on Markman’s patent. The trial judge agreed and granted Westview’s motion.

Markman appealed, arguing that the trial judge impermissibly usurped the jury’s function under the Seventh Amendment by deciding the claim-construction question as a matter of law.⁶¹ The Federal Circuit affirmed, holding that the interpretation of the claims in a patent is a question of law for the judge to decide.⁶² Markman appealed to the Supreme Court, which also affirmed, in a unanimous opinion.

Citing *Tull*, the Supreme Court described its inquiry as a two-step process. In the first step, the Court asks “whether [it is] dealing with a cause of action that either was tried at law at the time of the founding or is at least

⁵⁶ 517 U.S. 370 (1996).

⁵⁷ *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 374 (1996).

⁵⁸ *Id.*

⁵⁹ *Id.* at 374–75.

⁶⁰ *Id.* at 375.

⁶¹ *Id.* at 376.

⁶² *Id.*

analogous to one that was.”⁶³ Then, if it concludes that the action fits within the law category, the Court asks “whether the particular trial decision must fall to the jury in order to preserve the substance of the common-law right as it existed in 1791.”⁶⁴ On the first issue, the Court needed only two sentences to conclude that, because patent infringement actions were tried to a jury in 1791, this case also required a jury trial.⁶⁵

On the second issue—the important one both in the case and in this analysis—the Court’s approach was more involved and less consistent with prior practice. Although earlier decisions had described the function of the Seventh Amendment as “preserving the substance of the common-law right” to a jury, they had linked the “substance of the right” to the determination of facts. Apparently the first case to use that language was *Walker v. New Mexico & Southern Pacific Railroad Co.*,⁶⁶ in which the Court said that the purpose of the Seventh Amendment “is not to preserve mere matters of form and procedure but substance of right.”⁶⁷ The Court immediately followed that statement by announcing that “[t]his requires that questions of fact in common law actions shall be settled by a jury.”⁶⁸ Similarly, in *Gasoline Products Co. v. Champlin Refining Co.*,⁶⁹ the Court declared that “the Constitution is concerned, not with form, but with substance. All of vital significance in trial by jury is that issues of fact be submitted for determination [by the jury].”⁷⁰

But in *Markman*, the Court divorced the “substance of the right” from the question of fact determination.⁷¹ Declaring that claim construction is a “mongrel practice”—apparently in the sense of being a “mixed question of law and fact”—the Court proposed using the historical method to determine whether it should be performed by the jury.⁷² Almost immediately, however, the Court found that historical analysis could not provide a definite answer. “Prior to 1790 nothing in the nature of a claim had appeared either in British patent practice or in that of the American states . . . and we have accordingly found no direct antecedent of

⁶³ *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 376 (1996).

⁶⁴ *Id.* at 376.

⁶⁵ *Id.* at 377.

⁶⁶ 165 U.S. 593 (1897).

⁶⁷ *Walker v. New Mexico & S. Pac. R. R. Co.*, 165 U.S. 593, 596 (1897).

⁶⁸ *Id.*

⁶⁹ 283 U.S. 494 (1931).

⁷⁰ *Gasoline Prods. Co. v. Champlin Ref. Co.*, 283 U.S. 494, 498 (1931).

⁷¹ *Tull* had also talked about “the substance of the right” without mentioning the fact-law distinction, but that seemed to stem from the *Tull* Court’s sense that remedies issues fall outside the fact-law framework. See *Tull*, 481 U.S. at 426–27. *Markman*, in contrast, involves the interpretation of writings, a classic fact-law battleground.

⁷² *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 378 (1996).

modern claim construction in the historical sources.”⁷³ Undaunted, the Court searched for analogous cases, but still could do no better than to find that judges generally interpreted written documents at common law.⁷⁴

At last conceding that the historical analysis was inconclusive, the Court decided to “look elsewhere” to allocate responsibility for claim construction.⁷⁵ It turned to “existing precedent and . . . the relative interpretive skills of judges and juries and the statutory policies that ought to be furthered by the allocation.”⁷⁶ At this point, inevitably, the Court again ran into the fact-law distinction. Its search for relevant precedent led it to Justice Curtis’s conclusion in *Winans v. Denmead*⁷⁷ that construing the patent and the claim specifications therein “is a question of law, to be determined by the court,” while determining whether infringement occurred “is a question of fact, to be submitted to a jury.”⁷⁸ *Markman* countered by pointing to the later decision in *Bischoff v. Wethered*,⁷⁹ in which the Court held that, in a breach of contract claim involving the validity of a patent, the jury should construe the claims in the patent.⁸⁰ The *Markman* Court distinguished *Bischoff* on the ground that it was not a patent infringement case, so that the construction of the claim in that context presented a different kind of issue. But the Court had enough doubt about the matter to say that precedent provided no clear answer.⁸¹

Finally, the Court turned to “functional considerations,” noting that “when an issue ‘falls somewhere between a pristine legal standard and a simple historical fact, the fact-law distinction at times has turned on a determination that, as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question.’”⁸² Citing the “highly technical”

⁷³ *Id.* at 378–79.

⁷⁴ *Id.* at 381–82 (“[W]e do know that in other kinds of cases during this period judges, not juries, ordinarily construed written documents.”).

⁷⁵ *Id.* at 384.

⁷⁶ *Id.*

⁷⁷ 56 U.S. (15 How.) 330 (1853).

⁷⁸ *Winans v. Denmead*, 56 U.S. (15 How.) 330, 338 (1853).

⁷⁹ 76 U.S. (9 Wall.) 812 (1869).

⁸⁰ *Bischoff v. Wethered*, 76 U.S. (9 Wall.) 812, 815 (1869).

⁸¹ *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 388 (1996).

⁸² *Id.* (quoting *Miller v. Fenton*, 474 U.S. 104, 114 (1985)). The Court’s reliance on *Miller* is inapposite, because *Miller* did not address the allocation of responsibility between judge and jury. *Miller* was a habeas corpus case in which the convicted defendant claimed that his custodial confession should have been suppressed as involuntary by the state trial court. The federal district court dismissed the habeas petition and the Third Circuit affirmed, holding that the voluntariness of the confession was a “factual issue” under 28 U.S.C. § 2254(d), which commands deference to state court findings-of-fact. *Miller*, 474 U.S. at 108. The Supreme Court reversed that decision, concluding that voluntariness is either a legal question or a mixed

nature of patents, and noting that “[t]he construction of written instruments is one of those things that judges often do and are likely to do better than jurors unburdened by training in exegesis,” the Court found that “judges, not juries, are the better suited to find the acquired meaning of patent terms.”⁸³ Based on that conclusion, the Court held that the judge may permissibly construe the claims in a patent.

Markman solidifies the basic distinction enunciated in *Tull* between the issues of whether the jury right applies at all and whether a particular question must be decided by the jury. But *Markman* moves the analysis of the latter issue in a different direction by applying to it the historical and law-equity tests traditionally used to evaluate the former issue. Furthermore, it adds an entirely new component by introducing the notion of functional considerations into the analysis of decisional responsibility.

3. *Feltner v. Columbia Pictures Television, Inc.*⁸⁴

The next case the Court considered, *Feltner v. Columbia Pictures Television, Inc.*,⁸⁵ reprises the issues raised in *Tull* and in some respects repudiates *Tull*. Elvin Feltner owned a company, Krypton International, operating three television stations. Krypton became delinquent in paying royalties for programs it licensed from Columbia. Columbia terminated the license agreements, but Krypton continued to air the programs. Columbia brought suit for copyright infringement, ultimately seeking statutory damages under the Copyright Act of 1976. The district court granted Columbia summary judgment on the issue of liability.⁸⁶ The district court then denied Feltner’s request for a jury trial on the question of the amount of damages.⁸⁷ The court held a bench trial on damages and awarded Columbia the maximum available statutory damages, in the sum of \$8.8

question of law and fact, and that in either case it is subject to plenary federal review. *Id.* at 110–12.

Voluntariness is an aspect of the decision as to whether a particular datum—the confession—should be put before the ultimate decision maker. This kind of preliminary question on what evidence may be put before the decision maker is always decided by the judge. *Miller* is thus a case asking which judge should decide a question that only a judge can decide. Although the issue is framed in terms of the distinction between factual and legal determinations, it does not implicate the Seventh Amendment’s right to a jury trial. To the extent the question of whether a trial judge or appellate judge should decide a legal question raises constitutional concerns, they involve the due process clause.

⁸³ *Id.* The Court also concluded that importance of uniformity in the treatment of a patent was reason to assign claim construction to a judge, whose decision becomes precedent available in future cases involving the same product. *Id.* at 390.

⁸⁴ 523 U.S. 340 (1998).

⁸⁵ *Id.*

⁸⁶ *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 342–43 (1998).

⁸⁷ *Id.* at 344.

million.⁸⁸ After the Ninth Circuit affirmed the award, Feltner appealed to the Supreme Court, arguing that the refusal to grant a jury trial on the damages question violated the Seventh Amendment.

The Supreme Court reversed, holding that the Seventh Amendment required a jury trial on the damages question.⁸⁹ The Court first found that the Copyright Act could not be read to grant a jury trial on statutory damages, so that the Court could not avoid the constitutional question.⁹⁰ The Court then addressed Columbia's primary argument, that the Seventh Amendment does not require a jury trial on the statutory damages question because statutory damages are an equitable remedy. Applying the historical test, the Court found that copyright suits for money damages were considered "legal" rather than "equitable" at common law.⁹¹ Because copyright suits for money damages had historically been tried to juries, the Court held that the Seventh Amendment required a jury trial in this case. Finally, the Court held that the specific question of the *amount* of statutory damages had to go to the jury, based on the traditional preference for jury determinations of damages and on the fact that under the Copyright Act of 1831 juries had determined statutory damages. The Court distinguished *Tull*, noting that there had been no evidence in *Tull* that juries historically determined the amount of civil penalties paid to the government and that civil penalties are analogous to sentencing in a criminal proceeding.⁹²

Like the decision in *Markman*, the Court's decision in *Feltner* both reiterates and blurs the distinction between the issues of whether some right to a jury applies and whether the jury should decide a particular question. Under established precedent, for better or worse, the former turns on the law-equity distinction, analyzed through the historical test. The Court properly invoked that test to decide that a jury right applies in a copyright damages case. Like the *Markman* Court, however, the *Feltner* Court then extended the historical analysis to the analytically distinct question of whether a jury should decide on the amount of statutory damages.

⁸⁸ *Id.*

⁸⁹ *Id.* at 355.

⁹⁰ *Id.* at 345–47.

⁹¹ *Id.* at 351–52.

⁹² *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 355 (1998). The Court hinted that *Tull* might have been wrongly decided:

It should be noted that *Tull* is at least in tension with *Bank of Hamilton v. Lessee of Dudley*, 2 Pet. 492 (1829), in which the Court held in light of the Seventh Amendment that a jury must determine the amount of compensation for improvements to real estate, and with *Dimick v. Schiedt*, 293 U.S. 474 . . . , in which the Court held that the Seventh Amendment bars the use of additur.

Id. at 355, n.9.

4. City of Monterey v. Del Monte Dunes, Ltd.

Like *Feltner*, *City of Monterey v. Del Monte Dunes, Ltd.*⁹³ relies heavily on language from *Markman*. But where the Court in *Feltner* found a basis for decision in historical analysis, the Court in *Del Monte Dunes* ostensibly relied on *Markman*'s "functional considerations" to determine whether the judge or jury should decide a takings question.

Del Monte Dunes owned an ocean-front parcel of land, which it hoped to develop.⁹⁴ The City of Monterey rejected five development applications over five years, each time imposing more rigorous conditions.⁹⁵ At last, Del Monte Dunes became convinced that the city would not permit development under any circumstances and brought an action under 42 U.S.C. § 1983, alleging due process and equal protection violations and an unconstitutional regulatory taking.⁹⁶ The district court granted Del Monte Dunes' request for a jury trial on the takings and equal protections claims, but denied it on the substantive due process claim, reserving that claim for itself.⁹⁷

The takings claim became the key point of contention. The district court instructed the jury that it should find for Del Monte Dunes on the takings claim "if it found either that Del Monte Dunes had been denied all economically viable use of its property or that the city's decision to reject the plaintiff's 190 unit development proposal did not substantially advance a legitimate public purpose."⁹⁸ The court also issued the following instructions explaining what the jury needed to determine to establish either of those propositions:

For the purpose of a taking claim, you will find that the plaintiff has been denied all economically viable use of its property, if, as the result of the city's regulatory decision there remains no permissible or beneficial use for that property

Public bodies, such as the city, have the authority to take actions which substantially advance legitimate public interest[s] and legitimate public interest[s] can include protecting the environment, preserving open space agriculture, protecting the health and safety of its citizens, and regulating the quality of the community by looking at development. So one of your jobs as jurors is to decide if the city's decision here substantially advanced any such legitimate public purpose.

⁹³ 526 U.S. 687 (1999).

⁹⁴ *Id.* at 693–94.

⁹⁵ *Id.* at 695–98.

⁹⁶ *Id.* at 698.

⁹⁷ *Id.* at 699.

⁹⁸ *City of Monterey v. Del Monte Dunes, Ltd.*, 526 U.S. 687, 700 (1999) (internal quotes omitted).

The regulatory actions of the city or any agency substantially advanc[e] a legitimate public purpose if the action bears a reasonable relationship to that objective⁹⁹

The jury returned a general verdict for Del Monte Dunes on the takings claim and awarded \$1.45 million in compensatory damages.¹⁰⁰ The Ninth Circuit affirmed and the City of Monterey appealed to the Supreme Court, arguing, among other things, that the question of liability on the regulatory takings claim should not have been sent to the jury.¹⁰¹

Citing *Markman*, the Supreme Court again described its inquiry as a two-step process in which the Court must determine first whether the cause of action triggers some jury right and second whether the particular decision “must fall to the jury in order to preserve the substance of the common-law right as it existed in 1791.”¹⁰² Applying the historical test, the Court easily dispensed with the first question. The Court found that an action for compensation for a constitutional violation is analogous to a tort action for damages, and so constitutes an action at law to which a jury right attaches.¹⁰³

On the second question, the Court again looked to *Markman*, stating that it determines which issues must go to the jury by the historical method, and when history does not provide a clear answer, by looking to precedent and functional considerations.¹⁰⁴ As in *Markman*, the Court’s historical analysis failed to provide a definitive answer.¹⁰⁵ Its examination of precedent also proved inconclusive.¹⁰⁶ Accordingly, the Court turned to “functional considerations.” The functional analysis, however, focused almost exclusively on the fact-law distinction. The Court began by noting that “[i]n actions at law predominantly factual issues are in most cases allocated to the jury.”¹⁰⁷ It then cited its takings precedents for the proposition that “determinations of liability in regulatory takings cases [are] ‘essentially ad hoc, factual inquiries,’ . . . requiring complex factual assessments of the purposes and economic effects of government actions.”¹⁰⁸ It concluded that “the issue [of] whether a landowner has been deprived of all economically viable use of his property is a predominantly factual

⁹⁹ *Id.* at 700–01.

¹⁰⁰ *Id.* at 701.

¹⁰¹ *Id.* at 702. The city had conceded that it was appropriate for the jury to decide on the amount of the award. *Id.* at 707.

¹⁰² *Id.* at 708.

¹⁰³ *City of Monterey v. Del Monte Dunes, Ltd.*, 526 U.S. 687, 710–11 (1999).

¹⁰⁴ *Id.* at 718.

¹⁰⁵ *Id.* at 718–19.

¹⁰⁶ *Id.* at 719–20.

¹⁰⁷ *Id.* at 720.

¹⁰⁸ *Id.* (internal quotes omitted).

question.”¹⁰⁹ The Court found the question of whether the regulation substantially advances legitimate public interests to be a mixed question of law and fact. But it concluded that the question was so “essentially fact-bound in nature” that it required a jury decision.¹¹⁰ Finally, in responding to the city’s argument that submitting the latter question to the jury would trench on government’s ability to set land-use policy, the Court noted that “the determination whether the statutory purposes were legitimate, or whether the purposes, though legitimate, were furthered by the law or general policy, might well fall within the province of the judge.”¹¹¹

Del Monte Dunes, while purporting to follow *Markman*’s analytical framework, in fact swings back toward the fact-law distinction as a basis—or at least as a justification—for assigning a particular decision to the jury instead of to the judge. It is important because it suggests that *Markman*’s “functional considerations” may do no more than enshrine the fact-law distinction. It does not, however, provide any significant analysis into how a “fact question” should be identified. The Court’s most recent Seventh Amendment decision, though, does at least suggest an answer to that problem.

5. *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*

The final installment of the Court’s recent series of cases allocating decisional responsibility under the Seventh Amendment, *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*,¹¹² involved an application of the re-examination clause rather than the trial-by-jury clause. It thus presents somewhat different problems than the previous four cases did. Nevertheless, it is important because of its treatment of the fact-law dichotomy.

Cooper and Leatherman were competitors manufacturing multi-function tools similar to the classic Swiss Army knife.¹¹³ After Cooper used a retouched photo of Leatherman’s product in advertisements, Leatherman brought suit against Cooper alleging trade-dress infringement, unfair competition, and false advertising under the Lanham Act, plus common-law unfair competition.¹¹⁴ After trial, the case was sent to a jury with special interrogatories.¹¹⁵ The jury found that Cooper had engaged in false advertising and unfair competition, among other things, and awarded \$50,000 in compensatory damages.¹¹⁶ It then found that

¹⁰⁹ *City of Monterey v. Del Monte Dunes, Ltd.*, 526 U.S. 687, 720 (1999).

¹¹⁰ *Id.* at 721.

¹¹¹ *Id.* at 722.

¹¹² 532 U.S. 424 (2001).

¹¹³ *Id.* at 427.

¹¹⁴ *Id.* at 427–28.

¹¹⁵ *Id.* at 428.

¹¹⁶ *Id.* at 429.

Cooper had either “acted with malice or shown a reckless and outrageous indifference to a highly unreasonable risk of harm and acted with a conscious indifference to Leatherman’s rights.”¹¹⁷ Based on that finding, the jury awarded \$4.5 million in punitive damages.¹¹⁸ Cooper asked the district court to reduce the punitive award on due process grounds, and when it refused, Cooper appealed that decision.¹¹⁹ The Ninth Circuit affirmed, finding that the district court did not abuse its discretion in refusing to reduce the award.¹²⁰ On appeal to the Supreme Court, Cooper argued that the Ninth Circuit had applied an improper standard in the review of the district court’s decision.¹²¹ The Supreme Court agreed, holding that the court of appeals should have reviewed the constitutionality of the punitive award de novo.¹²²

In the Supreme Court, Leatherman argued against the de novo standard on the ground that appellate review of the district court’s determination that the punitive award was constitutional was improper under the Seventh Amendment’s re-examination clause.¹²³ At common law, only a trial judge could set aside a jury verdict for excessiveness, and appellate review of a trial judge’s decision not to set aside a verdict was deemed a violation of the Seventh Amendment.¹²⁴ The Court held in *Gasperini v. Center for Humanities, Inc.*, however, that an appellate court could review a trial judge’s decision not to set aside a compensatory award on an abuse-of-discretion standard.¹²⁵ Leatherman contended that, to the extent an appellate court could review a trial judge’s decision not to set aside a punitive award, it should be on the same abuse-of-discretion standard.¹²⁶

The Supreme Court disagreed, concluding that “[b]ecause the jury’s award of punitive damages does not constitute a finding of ‘fact,’ appellate review of the District Court’s determination that an award is consistent with due process does not implicate the Seventh Amendment concerns raised by [Leatherman]”¹²⁷ Its reasoning on this point is significant, because it demonstrates a relatively nuanced sense of the distinction between factual and legal questions. The Court first noted that “[u]nlike the measure of actual damages suffered, which presents a question of historical or predictive fact, . . . the level of punitive damages is not

¹¹⁷ *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 429 (2001).

¹¹⁸ *Id.* at 428–29.

¹¹⁹ *Id.* at 429.

¹²⁰ *Id.*

¹²¹ *Id.* at 431.

¹²² *Id.* at 436.

¹²³ *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 437 (2001).

¹²⁴ *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 434 (1996).

¹²⁵ *Id.* at 435.

¹²⁶ *Cooper Indus.*, 532 U.S. at 437.

¹²⁷ *Id.*

really a ‘fact’ ‘tried’ by the jury.”¹²⁸ Responding to Leatherman’s contention that punitive damages have historically been considered the province of the jury, the Court described the shift from a “compensatory” to a “punitive” or “exemplary” theory of punitive damages.¹²⁹ Where in the past, punitive damages had provided compensation for intangible or other injuries not available as compensatory damages, today punishment is the primary purpose.¹³⁰ The Court noted that the shift entails a transition from a more to a less factual inquiry.¹³¹

Although this discussion is not fully developed, it suggests an understanding of the fact-law distinction—and its role vis-à-vis the Seventh Amendment—rooted in inferential processes at work in answering a particular question. The Court saw that “factual” questions are characterized by “historical” or “predictive” inferences. It then distinguished the “factual” question of compensation, a question that requires inductive inferences about the subject matter of the dispute, from the non-factual question of the appropriate punishment for a wrongdoer, a question involving primarily considerations of fairness and justice. The Court noted that the punitive damage determination rests on consideration of factual elements, including “[t]he defendant’s motive,” but suggested that those elements should be decided by the jury and could not be disregarded by a reviewing court.¹³²

Cooper is the jumping-off point for my analysis of the fact-law distinction and its role in allocating decisional responsibility under the Seventh Amendment. I will argue that, as the *Cooper* Court suggested, it is possible to distinguish questions of fact from questions of law based on the kinds of inferences required to answer them. I will then argue that courts should use such an inferential analysis in determining whether the judge or jury should decide a particular question under the Seventh Amendment.

III. AN INFERENTIAL ACCOUNT OF THE FACT-LAW DISTINCTION

Providing an inferential account of the fact-law distinction and its application in the Seventh Amendment context requires two steps. The first step involves identifying those questions which a jury *may* answer. The vast majority of decisions made during the course of litigation are exclusively the province of the judge. Juries are simply not eligible to decide the many procedural and preliminary questions that arise prior to and during trial. Instead, the judge answers these kinds of questions in what I call the judicial screening function. The

¹²⁸ *Id.* (quoting *Gasperini*, 518 U.S. at 459 (Scalia, J., dissenting)).

¹²⁹ *Id.* 437–38.

¹³⁰ *Id.* at 437–38 n.11.

¹³¹ *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 437–38 n.11 (2001).

¹³² *Id.* at 439 n.12.

questions a judge answers while performing this function, questions which are colloquially called “questions of law,” must be removed from the analysis to allow focus on the types of questions that juries are eligible to answer. Having done that, the second step in the analysis involves the more complex problem of identifying the questions the jury *must* answer.

The key to this analysis is to keep in mind that, in an adversarial system such as ours, the decision makers—be they judges, juries, or some other kind of referee—do not have the power to seek out and resolve disputes.¹³³ Instead, the decisional process is instigated and guided by the parties, acting through their lawyers. The process begins when one of the parties initiates the adjudication by invoking the power of a court. The parties then set the machinery of decision in motion by a two-step process: First, one or both parties put before the tribunal a body of data on which a decision may be based; then the parties submit a question or questions to be answered in reference to the data. Either the judge or the jury then answers the questions based on the data. This process recurs throughout the litigation, first through the submission of motions and later through the introduction of evidence at trial and the submission of jury instructions. At each stage, a determination must be made, by the judge, as to who should answer the questions.

A. Identifying the Questions the Jury is Eligible to Answer

Judges have an exclusive role in the adjudicative process that, while often referred to under the rubric “law,” involves many questions of fact. This role, which I call the “judicial screening role,” entails regulating the actions of the parties to ensure that the adjudicative process unfolds in a way that comports with systemic norms. In the screening role, the judge makes many decisions involving the “facts” of the case. Nevertheless, these decisions are not understood to implicate the Seventh Amendment. Although the allocation of these decisions to the judge is often justified by calling them matters of “law,” that term, when invoked to describe these sorts of supervisory decisions, has a different sense than when invoked to describe questions that may be posed to the jury.¹³⁴ Decisions made in the screening role are called decisions of “law” merely as a matter of convention rather than in counterpoint to decisions of “fact.” What distinguishes these screening decisions from those that may go to the jury is not the *nature* of the inquiry but its *function*. As long as the decisions serve the purpose of

¹³³ See WILLIAM BURNHAM, INTRODUCTION TO THE LAW AND LEGAL SYSTEM OF THE UNITED STATES 78 (2d ed. 1999) (“The most fundamental principle of the adversary system is its insistence upon strictly separating the active function of investigating and gathering evidence from the more passive function of considering the evidence and deciding the case.”).

¹³⁴ See Stephen A. Weiner, *The Civil Jury Trial and the Law-Fact Distinction*, 54 CAL. L. REV. 1867, 1867–72 (1966) (distinguishing “questions of law” relating to governing rules from application of “law” to “fact” in specific cases).

regulating the way in which the parties have set an issue up for decision, they fall within the judge's exclusive authority. There are three basic types of questions in this class; I will briefly discuss each of them.

The first type of decision in this class addresses the propriety of the chosen forum. Although the parties initially select the forum, they are not free to choose any court for the resolution of their dispute. The court must have power both over the subject matter of the dispute and over the parties themselves.¹³⁵ In other words, the court must have both subject-matter and personal jurisdiction.¹³⁶ Decisions as to whether jurisdiction is proper are made by the judge.¹³⁷ These decisions take many different forms; some of the more common forms involve questions about whether a long-arm statute is satisfied,¹³⁸ whether process has been adequately served,¹³⁹ whether the requirement of diversity is satisfied,¹⁴⁰ and whether a federal statute might govern the ultimate disposition of the case.¹⁴¹ These kinds of questions routinely require inferences about the parties and the nature of the dispute that are clearly factual in my sense. Nevertheless, they are reserved for the judge.¹⁴²

Once the judge determines that the dispute is in a proper forum, the parties move the litigation toward resolution by the two-step process of presenting data to

¹³⁵ See FRIEDENTHAL ET AL., *supra* note 8, at 8–10 (providing overview of jurisdiction).

¹³⁶ See U.S. CONST. art. III, § 2 (providing jurisdictional bases).

¹³⁷ See FED. R. CIV. P. 12(d) (providing that jurisdictional defenses shall be heard and determined before trial unless court orders their deferral to trial); *Gibbs v. Buck*, 307 U.S. 66, 71–72 (1939) (“As there is no statutory direction for procedure upon an issue of jurisdiction, the mode of its determination is left to the trial court.”). Subject-matter jurisdiction is one of the few areas in which the judge may make a decision without any impetus from the parties. See FRIEDENTHAL ET AL., *supra* note 8, at 12 (“If a subject-matter jurisdiction defect exists, it may be raised at any time, even on appeal, and the court is under a duty to point it out if the parties do not.”).

¹³⁸ See FRIEDENTHAL ET AL., *supra* note 8, at 141–44 (describing long-arm statutes).

¹³⁹ See FED. R. CIV. P. 4 (providing guidelines for service of process).

¹⁴⁰ See 28 U.S.C. § 1332 (2000) (providing requirements for diversity jurisdiction); *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806) (requiring complete diversity of parties).

¹⁴¹ See 28 U.S.C. § 1331 (2000) (“The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.”); FRIEDENTHAL ET AL., *supra* note 8, at 15 (“The most difficult single problem in determining whether federal question jurisdiction exists . . . is deciding when the relation of federal law to a case is such that the action may be said to be one ‘arising under’ that law.”).

¹⁴² Sometimes, most prominently in cases invoking federal question jurisdiction, those factual inferences take on such significance as to require a jury decision. The Supreme Court has held that where the jurisdictional issues and the “merits” are inextricably intertwined, a jury decision may be required. See *Land v. Dollar*, 330 U.S. 731, 735–39 (1947) (holding that a trial on the merits is required when jurisdiction turns on the merits). See also 8 JAMES WM. MOORE, MOORE’S FEDERAL PRACTICE § 38.34 (3rd ed. 2003) (describing availability of jury trial regarding procedural matters); Note, *Trial by Jury of Preliminary Jurisdictional Facts in Federal Courts*, 48 IOWA L. REV. 471 (1963) (same).

the decision maker and posing questions relating to the data. Questions about the data to be presented and the questions to be posed are the second and third main types of questions in this class.

Decisions about what data is appropriate are made both before and during trial. Before trial, the parties offer data on paper, through the pleadings and through affidavits, deposition transcripts, and other materials appended to motions. At trial, data is offered through oral argument, through live testimony of witnesses, and through the introduction of tangible objects. The judge determines whether the data the parties offer is appropriate, by reference to the rules of civil procedure and the rules of evidence.¹⁴³ The judge may reject data on a variety of mostly policy-based grounds; some of the more important are the rules excluding privileged information,¹⁴⁴ hearsay,¹⁴⁵ and character evidence.¹⁴⁶ In addition, the judge may conclude that a given datum, although not covered by an exclusionary rule, has no utility for the determination of the matter and so should not be considered.¹⁴⁷ Or, in the alternative, the judge may conclude that a given datum must be accepted as true, even if related questions ultimately go to the jury.¹⁴⁸

These decisions about the data submitted involve a wide variety of questions that are "factual" in my sense. Often they require express inductive conclusions about the events in dispute. For example, many hearsay exceptions turn on the circumstances surrounding the making of the out-of-court statement.¹⁴⁹ Those circumstances may be identical to the circumstances that led to the dispute and so

¹⁴³ See GRAHAM C. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE 8-9 (3d ed. 1996) (describing judge's role in resolving factual disputes in pre-trial motions and as incident to the admission of evidence at trial).

¹⁴⁴ See MCCORMICK ON EVIDENCE §§ 126-43 (John W. Strong ed., 5th ed. 1999) (outlining evidentiary privileges).

¹⁴⁵ See FED. R. EVID. 801-07.

¹⁴⁶ See FED. R. EVID. 404-05.

¹⁴⁷ See FED. R. EVID. 401-03. The judge may exclude any evidence that has no tendency to make a fact of consequence to the determination of the action more or less probable. FED. R. EVID. 401-02. Furthermore, even if evidence has some tendency to make a fact of consequence more or less probable, the judge may exclude it if the judge concludes that the risks of "unfair prejudice, confusion of the issues, or misleading the jury, or [] considerations of undue delay, waste of time, or needless presentation of cumulative evidence" substantially outweigh its probative value. FED. R. EVID. 403.

¹⁴⁸ See FED. R. EVID. 201 (giving court authority to take judicial notice of information "not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned").

¹⁴⁹ See, e.g., FED. R. EVID. 801(d)(2)(D) (establishing a hearsay exclusion that turns on agency relationship between the party and declarant); FED. R. EVID. 803(1) (providing for a hearsay exception that turns on whether the declarant made the statement while perceiving the described event); FED. R. EVID. 804(b)(2) (granting a hearsay exception that turns on whether declarant had a belief in impending death at the time that the statement was made).

lie at the heart of the litigation.¹⁵⁰ Nevertheless, the jury plays virtually no role in answering these questions.¹⁵¹

More problematic is the issue of whether a question posed by a party is appropriate. Judges, through their legal training and experience, are inculcated into a legal culture in which they have certain background understandings of what is "law" and a common sense of the sources to which they can look to find more "law."¹⁵² There is no definition of "law" and no list of sources containing "law." Actors in the legal system define "law" on an ongoing basis by their conduct.¹⁵³ Most judges seem to lean heaviest on sources such as cases, statutes, and treatises, as well as on the judge's notions of justice, fairness, and public policy, not to mention the judge's personal biases and prejudices.¹⁵⁴

¹⁵⁰ See FED. R. EVID. 801(d)(2)(E) (stating that the hearsay exclusion, often invoked in conspiracy cases, turns on whether the statement was made during the course of, and in the furtherance of, a conspiracy).

¹⁵¹ See JOHN HENRY WIGMORE, 9 A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2550 (3d ed. 1940) ("The admissibility of a given piece of evidence is for the judge to determine."). This is arguably an overly simplistic approach to the admissibility calculus. In several places, the Federal Rules of Evidence confer on the jury the power to decide ultimately whether evidence is admissible. See FED. R. EVID. 104(b), 602, 901, 1008. In a well-known article, Professor John Kaplan dissected these rules to show how difficult it can be to figure out whether the judge or the jury should determine admissibility. See John Kaplan, *Of Mabrus and Zorgs—An Essay in Honor of David Louisell*, 66 CAL. L. REV. 987 (1978). But the complexities Professor Kaplan and others have uncovered have little practical effect for my analysis. In each case in which the jury nominally decides on admissibility, the judge decides whether the jury ever gets to consider the evidence, based on his determination of whether there is sufficient evidence to support a finding that the evidence is what it is purported to be. See FED. R. EVID. 104(b) ("When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition."). Thus, the judge in all situations decides whether the parties will be able to rely on any given datum. That question, rather than any ultimate conclusion of "admissibility," is the one that concerns me.

¹⁵² See STANLEY FISH, *DOING WHAT COMES NATURALLY* 126–27 (1989).

¹⁵³ See BRIAN Z. TAMANAHA, *A GENERAL JURISPRUDENCE OF LAW AND SOCIETY* (2001).

¹⁵⁴ See BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 10 (1921). Cardozo stated:

What is it that I do when I decide a case? To what sources of information do I appeal for guidance? . . . If a precedent is applicable, when do I refuse to follow it? If no precedent is applicable, how do I reach the rule that will make a precedent for the future? If I am seeking logical consistency, the symmetry of the legal structure, how far shall I seek it? At what point shall the quest be halted by some discrepant custom, by some consideration of the social welfare, by my own or the common standards of justice and morals? Into that strange compound which is brewed daily in the caldron of the courts, all these ingredients enter in varying proportions.

Id.

When a litigant poses a question, the judge has to decide whether that question "fits" with the law as the judge constructs it in accordance with her background knowledge and research. Assume, for example, that a litigant who is a public official claims that he has been defamed. He asserts that the dispositive question in the case is whether the defendant acted negligently in publishing untruthful and injurious statements about him. The judge will (probably) refuse to allow that question to be asked because the question is not "appropriate." Sources with broadly recognized authority indicate that the more appropriate question is whether the defendant acted with actual malice in publishing untruthful and injurious statements about the plaintiff.¹⁵⁵

Decisions about whether a particular question is appropriate appear in several different manifestations. One of the most obvious is the ruling on a motion to dismiss. Where a plaintiff raises a novel theory of recovery, the defendant may move to dismiss for failure to state a claim.¹⁵⁶ In doing so, the defendant effectively asks the court to decide whether a question proposed by the plaintiff is appropriate.¹⁵⁷ If the judge finds that it is inappropriate, the judge dismisses the claim turning on the answer to that question. Later in the proceedings, in conjunction with the trial, the parties submit proposed jury instructions.¹⁵⁸ The submission of proposed jury instructions is simply the suggestion of questions to be posed to the jury. The judge decides whether the questions the parties propose are appropriate, and may even formulate questions himself.¹⁵⁹ Similar decisions may be made implicitly or explicitly at other points in the litigation, such as on summary judgment¹⁶⁰ and in discovery and evidentiary rulings.¹⁶¹

Note that, in the defamation example, the judge did not have to draw any conclusions about what actually occurred leading to the dispute. She could make

¹⁵⁵ See *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964).

¹⁵⁶ FED. R. CIV. P. 12(b)(6).

¹⁵⁷ See FRIEDENTHAL ET AL., *supra* note 8, at 303 (stating that motion to dismiss for failure to state claim "asks whether, if all the allegations are true, the pleader has stated a valid claim or defense under the law").

¹⁵⁸ See FED. R. CIV. P. 51 ("At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests.").

¹⁵⁹ See FRIEDENTHAL ET AL., *supra* note 8, at 480 ("The court, after consultation with and sometimes argument by the parties, determines which of these to give and which of its own to add or substitute.").

¹⁶⁰ See FED. R. CIV. P. 56. Very often summary judgment motions involve the same sorts of arguments raised in motions to dismiss, and the civil rules even provide for motions to dismiss to be treated as summary judgment motions under certain circumstances. See FED. R. CIV. P. 12(c).

¹⁶¹ In the context of discovery and evidentiary rulings, the judge may decide that certain data should not be considered because the questions to which it would be relevant are not appropriate. Although the decision comes out as a decision that data should not be put before the court, it is really a decision that a proposed question should not be asked.

a decision about the appropriateness of the question looking only at the question.¹⁶² Often, however, decisions at this stage strike at the gray area between a decision that a question is inappropriate in the abstract and a decision that a question must be answered a particular way given the facts of the case.¹⁶³ It is now beyond dispute that judges have limited power to make decisions of the latter type.¹⁶⁴ But the standard is high. The judge must be convinced that, given the data put forward by the parties, reasonable people could answer the question only one way.¹⁶⁵ In modern parlance, these decisions are called judgments as a matter of law. They occur most obviously in the context of motions to dismiss and motions for summary judgment and by way of the trial and post-trial rulings

¹⁶² Decisions purely on the “appropriateness” of a question posed do not raise questions of fact under my theory; they do not require inductive inferences about the transactions or occurrences in dispute. They may, of course, be considered “factual” in some other sense. See Gary Lawson, *Proving the Law*, 86 NW. U. L. REV. 859 (1992) (arguing that legal propositions are themselves “factual” propositions that must be proved using standards similar to those used to prove facts).

¹⁶³ See *Evans v. General Motors Corp.*, 359 F.2d 822 (7th Cir. 1966). *Evans*, a suit against General Motors for injuries sustained in a car accident, shows the interplay between the judge’s authority to regulate the questions posed and the judge’s power to decide questions where there is no reasonable dispute as to the answer. The plaintiff alleged that the car was made with an X frame, which provided less protection in a crash than a perimeter frame would have. *Id.* at 823. The plaintiff asked for a determination that “the collision which occurred was a foreseeable emergency and that by omitting side frame rails, defendant created an unreasonable risk of harm to occupants of the automobile it manufactured.” *Id.* at 824. In other words, the plaintiff wanted liability to hinge on the question, “Was the collision foreseeable?” The defendant moved to dismiss for failure to state a claim, arguing that the determinative question was not whether the collision was foreseeable, but whether defendant had “design[ed] its automobile to be reasonably fit for the purpose for which it was made.” *Id.* at 826 (Kiley, J., dissenting). The court agreed that the defendant’s question was the appropriate one, calling its resolution of that issue a “matter of law.” *Id.* Furthermore, the court answered the question itself, finding that “[t]he intended purpose of an automobile does not include its participation in collisions with other objects, despite the manufacturer’s ability to foresee the possibility that such collisions may occur.” *Id.* at 825. Although it did not say so explicitly, the court necessarily found that the defendant’s question could be answered only one way. *Cf.* *Larsen v. General Motors Corp.*, 391 F.2d 495, 498, 502–03 (8th Cir. 1968) (citing *Evans* but finding that collisions *are* a part of the intended use of an automobile).

¹⁶⁴ See FED. R. CIV. P. 50(a)(1) (“If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law . . .”).

¹⁶⁵ See *Simblest v. Maynard*, 427 F.2d 1, 4 (2d Cir. 1970) (“[The test] is whether the evidence is such that, without weighing the credibility of the witnesses or otherwise considering the weight of the evidence, there can be but one conclusion as to the verdict that reasonable [persons] could have reached.”).

traditionally known as the directed verdict and judgment notwithstanding the verdict (JNOV).¹⁶⁶

A decision that a question could be answered only one way typically involves inferences of fact as I define them. Nevertheless, courts have consistently held that judges may make these decisions without violating the Seventh Amendment. In the leading case, *Galloway v. United States*,¹⁶⁷ the Supreme Court reviewed a district court's grant of a directed verdict for the government at the close of evidence in the plaintiff's suit seeking disability benefits under a government insurance contract.¹⁶⁸ The central issue was whether the plaintiff's disability existed as of the date the insurance lapsed.¹⁶⁹ The Court reviewed the evidence in the record in detail, focusing on the plaintiff's failure to present any evidence of his disability during the eight years following the lapse of the policy.¹⁷⁰ Concluding that that "[n]o favorable inference can be drawn from the omission," the Court affirmed.¹⁷¹ Despite the factual character of this determination, the Court found no Seventh Amendment violation in the directed verdict practice.¹⁷² The Court noted that the Seventh Amendment "requires that the jury be allowed to make reasonable inferences from facts proven in evidence having a reasonable tendency to sustain them. . . . But it does not require that . . . the jury be permitted to make inferences from the withholding of crucial facts"¹⁷³ Where the evidence supporting a proposition is overwhelming, or, as in *Galloway*, where there is no evidence for a proposition, a jury decision would add nothing; by definition, a question about such a proposition could be answered only one way.

In sum, the judge has the authority—almost always exercised only at the behest of the parties—to make a number of screening decisions. First, she decides whether the case is in an appropriate forum. Then she decides what data may be relied upon in deciding any question, as well as whether a proposed question is appropriate. Finally, she has the authority to decide whether reasonable minds could differ on a question posed. If a question could be answered only one way because the evidence is either absent or overwhelming, the judge simply decides it accordingly. But if the question could be answered more than one way, and one

¹⁶⁶ See WRIGHT & MILLER, *supra* note 8, § 2521 (describing historical background to Rule 50).

¹⁶⁷ 319 U.S. 372 (1943).

¹⁶⁸ *Id.* at 373. The plaintiff Galloway had served in World War I and was insured by contract under the War Risk Insurance Act. *Id.* at 372. He stopped paying the premiums in 1919. *Id.* Thereafter, his mental condition deteriorated until, by 1934, he was "totally and permanently disabled by reason of insanity" *Id.* at 374. His wife brought suit in his name to recover benefits under the War Risk policy. *Id.*

¹⁶⁹ *Galloway v. United States*, 319 U.S. 372, 375 (1943).

¹⁷⁰ *Id.* at 375–86.

¹⁷¹ *Id.* at 386.

¹⁷² *Id.* at 395.

¹⁷³ *Id.* at 396.

of the parties demands a jury decision, the judge must determine whether she or the jury should answer it.

All of those screening decisions are called matters of “law.” The common criticism of the fact-law distinction—that the terms “fact” and “law” are nothing more than labels to describe a normative conclusion that the jury or the judge is best suited to decide a question—has greatest force in this context. Screening decisions involve questions of fact as well as questions of law. We assign them to the judge because we believe the judge is best suited to answer them. We call them matters of law because we have assigned them to the judge. That terminology is unfortunate. Lumping all screening decisions under the “law” heading creates confusion about the nature of the fact-law distinction. By delineating the decisions the judge makes in her screening capacity and removing them, the fact-law distinction becomes much less circular and confusing. With an appropriate set of data to consider and an appropriate question before it, the judge must determine whether a given question is one of fact or of law. My argument, fleshed out in the next section, is that the decision about whether such a question is one of law or of fact turns on the types of inferences required to answer the question.

B. *The Inferential Test for Questions of Fact*

1. *The Categories of Inference in the Adjudicative Context*

Logicians have traditionally divided inference into two basic categories: deductive and inductive. The paradigmatic form of deductive reasoning is the categorical syllogism of the following type:

Socrates is a man;

All men are mortal;

Therefore, Socrates is mortal.

The distinguishing feature of the deductive syllogism is that its conclusion is contained in its premises. That is, it does not require any conjectures about the world beyond the information in the premises.¹⁷⁴ If it is true that Socrates is a

¹⁷⁴ See STEPHEN F. BARKER, *THE ELEMENTS OF LOGIC* 17 (2d ed. 1974) (“The essential feature of a *deductive* argument is that it establishes its conclusion absolutely demonstratively . . .”). In defining deduction in this way, I am drawing on a set of interconnected philosophical dichotomies: between necessary and contingent truths; between analytic and synthetic judgments; and between *a priori* and empirical knowledge. See SYBIL WOLFRAM, *PHILOSOPHICAL LOGIC: AN INTRODUCTION* 80 (1989); A.C. GRAYLING, *AN INTRODUCTION TO PHILOSOPHICAL LOGIC* 44–45 (1982); 1 *THE ENCYCLOPEDIA OF PHILOSOPHY* 105, 140–44 (Paul Edwards, ed. 1967). The concepts of necessary truth, analytic judgment, and

man, and it is true that all men are mortal, then it necessarily follows that Socrates is mortal.

Legal conclusions often take syllogistic form. For example:

Anyone who intentionally and unlawfully kills a

human being is guilty of murder;

A intentionally and unlawfully killed B;

Therefore, A is guilty of murder.

Once the decision maker knows that murder is defined as “the intentional and unlawful killing of a human being” and knows that a particular defendant has intentionally and unlawfully killed another, the conclusion that the defendant is guilty of murder follows without any conjecture or speculation required.¹⁷⁵

In contrast to deductive inferences, inductive inferences involve conjectures about unobserved events or conditions in the world.¹⁷⁶ Probabilistic, empirical inference is the hallmark of induction.¹⁷⁷ Where deduction relies on syllogistic reasoning from assumed general propositions, induction draws conjectural conclusions from data observed in the world.¹⁷⁸ Thus, arguments such as “A planned to kill B; therefore, A probably did kill B” are inductive because they require speculation about the likelihood that a person who had an intent to kill actually did kill.¹⁷⁹

a priori knowledge share a defining characteristic: they do not depend on experience with or confirmation from the world. Deductive inference shares this characteristic. While it does not necessarily flow from *a priori* knowledge (deductive inferences often depend on empirically-derived premises), it always consists of analytic judgments to necessary truths. It is contrasted with inductive inference, which produces contingent truths (one hopes) through synthetic judgments based on empirical knowledge.

¹⁷⁵ See RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 42–43 (1990) (giving examples of syllogistic legal reasoning).

¹⁷⁶ See BARKER, *supra* note 174, at 17 (“[T]he conclusion [of an inductive argument] makes some prediction or expresses some conjecture which goes beyond what the premises say but about which we can find out by further observations.”).

¹⁷⁷ See MORRIS R. COHEN & ERNEST NAGEL, *AN INTRODUCTION TO LOGIC AND SCIENTIFIC METHOD* 278–79 (1934) (defining induction in probabilistic terms).

¹⁷⁸ See BARKER, *supra* note 174, at 17 (“The essential feature of a *deductive* argument is that it establishes its conclusion absolutely demonstratively [T]he conclusion [of an inductive argument] makes some prediction or expresses some conjecture which goes beyond what the premises say but about which we can find out by further observations.”).

¹⁷⁹ See JOHN HENRY WIGMORE, *THE PRINCIPLES OF JUDICIAL PROOF* 16 (1913). Some logicians have considered this type of inference to be deductive because it depends on an unstated major premise that in some sense “contains” the probabilistic conclusion. Charles Sanders Peirce referred to this type of inference as probable deduction, formalized as follows:

At least for purposes of adjudication, inductive reasoning may be used to reach conclusions of three basic types: that an event or condition in the past or present probably has occurred or is occurring; that an event or condition in the future probably will occur; or that a hypothetical event or condition probably would occur given some postulated set of circumstances, a type of reasoning known as the counterfactual conditional.¹⁸⁰ The phrase "events or conditions" in these formulations is intended to encompass virtually all phenomena in the world, including the identity of things or persons, the occurrence of physical events or human acts, mental states, and relations of cause and effect.¹⁸¹

Of these types, the first, regarding actual historical events or conditions, is the most prevalent in adjudication. Virtually all of the "who, what, when, and where" questions in litigation call for this type of inference. In the case of "direct" evidence, the inference relates to the credibility of a witness; it entails a decision as to whether the witness perceived the described event, remembered it, and accurately related it.¹⁸² The decision maker listens to the witnesses, decides which to believe, and then draws conjectural conclusions about the world based on the testimony. "Circumstantial" evidence requires both an inference as to credibility and a further inference to matters beyond the information contained in

The proportion ρ of the M 's are P 's;

S is an M ;

It follows, with probability ρ , that S is a P .

CHARLES SANDERS PEIRCE, *PHILOSOPHICAL WRITINGS OF PEIRCE* 191 (Justus Buchler ed., 1955). Wigmore recognized that the inference could be formulated this way, but argued that it is best considered inductive because it depends for its probative force on a major premise that is derived inductively. WIGMORE, *supra* note 179, at 17. See also George F. James, *Relevancy, Probability and the Law*, 29 CAL. L. REV. 689 (1941) (criticizing Wigmore for downplaying significance of unstated major premise). But the same claim could be made about the major premise of most syllogisms. A better reason for considering this type of inference inductive in the context of adjudication is that the jury is not entitled to stop at the probabilistic conclusion that "A probably carried out his design." To find A guilty, the jury must reach an absolute conclusion (based on the applicable standard of proof) that A in fact carried out his design and killed B. To the extent the jurors draw such a conclusion they are exceeding the information contained in the premises, so their inference is best considered inductive.

¹⁸⁰ See Roderick M. Chisholm, *The Contrary-to-Fact-Conditional*, in *LOGIC AS PHILOSOPHY: AN INTRODUCTORY ANTHOLOGY* 118, 118 (Peter T. Manicas ed., 1971) ("We seem to have knowledge of what *might* have happened, of what *would* happen if certain conditions were realized, of what tendencies, faculties, or potentialities an object *could* manifest in suitable environments.").

¹⁸¹ See WIGMORE, *supra* note 179, at 3–4 (categorizing probanda sought to be proved at trial).

¹⁸² See LILLY, *supra* note 143, at 49 ("When direct evidence of a consequential proposition is presented . . . the trier is concerned solely with whether to believe the witness.").

the witness's testimony.¹⁸³ For example, assume that in a slip-and-fall case, to show that the floor of a store was wet at the time of the accident, the plaintiff calls a witness who saw a store customer spill water on the floor just before the plaintiff's fall. To reach the desired conclusion, the decision maker must make a probabilistic inference first that the spill occurred as the witness described it and then that the spilled water was still on the floor when the plaintiff fell.

The second type of inductive inference, involving predictive inferences about future events or conditions, arises most often in the remedies context. For example, in deciding whether to issue an injunction, a decision maker must decide whether the actions of the defendant will cause irreparable harm if allowed to continue. Personal injury actions often involve determinations of future lost earnings as well as future pain and suffering. Breach of contract actions may involve determinations of future lost profits. All these matters require probabilistic conjectures about events in the future.

The third type, regarding hypothetical events or conditions, is the central consideration in questions of causation. Causation is a notoriously difficult philosophical concept.¹⁸⁴ The best treatment of causation as a legal matter is H.L.A. Hart and Tony Honoré's *Causation in the Law*.¹⁸⁵ Hart and Honoré define causation in terms of expected courses of events. They describe the two aspects of tort causation, "but-for" cause and "proximate" or "legal" cause, as follows:

The necessity of the cause for the production of the consequence means that, in making causal statements, we must consult our knowledge of the general course of events. Under what sorts of conditions do things of this sort happen? Does this kind of thing happen without that kind of thing? The second aspect [proximate or legal cause] forces us to consider less definite issues and very often matters of degree. Although principles distinguishing between causes and mere conditions, or between factors which 'break the chain' of causation and those which do not, are to be found in ordinary thought apart from the law, their application often raises disputable questions of classification: Was this a coincidence? How likely was it? . . . In these questions the issue is not so much: 'Did *X* happen?' but rather 'Is what happened sufficiently like the standard case of an *X* to be classified with it for legal purposes?'¹⁸⁶

Determining whether event *A* is the but-for cause of event *B*, then, requires postulating a likely course of events and asking whether event *B* would be likely

¹⁸³ See LILLY, *supra* note 143, at 49 ("[W]hen circumstantial evidence is introduced . . . the trier not only must be concerned with whether to believe the witness, but also with whether the evidence increases the probability of the proposition to which it is directed . . .").

¹⁸⁴ See COHEN & NAGEL, *supra* note 177, at 245 ("The analysis of the meaning of 'causality' is a most difficult task.").

¹⁸⁵ H.L.A. HART & TONY HONORÉ, *CAUSATION IN THE LAW* (2nd ed. 1985).

¹⁸⁶ *Id.* at 111.

to occur in the absence of event *A*. Determining whether event *A* is the proximate or legal cause of event *B* requires similar but more nuanced considerations. The decision maker must decide whether event *A* is sufficiently extraordinary given the expected course of events to be designated a “cause” rather than a “condition” of event *B* for purposes of assigning fault.¹⁸⁷ In their focus on the likely course of events, both questions of but-for cause and questions of proximate cause require probabilistic inferences about hypothetical conditions in the world—the events that were most likely to happen given the state of the world prior to the injury.

The common ingredient in these different varieties of induction is their incorporation of inferences that exceed the decision maker’s existing body of knowledge. Deductive inferences reclassify or recharacterize data based on knowledge the decision maker already has. Inductive inferences lead to conjectural conclusions about the world, and hence to new knowledge. Keeping this distinction in mind is the key to understanding the fact-law distinction.

2. Applying Inferential Criteria to the Fact-Law Distinction

Dean Wigmore, the first scholar to probe the nature of judicial proof from a philosophical perspective, was also the first to explicitly link adjudicative fact-finding with inductive reasoning. Writing during the reign of “analytical jurisprudence,” under which it was supposed that judges could discern and apply rules of law deductively, from *a priori* principles,¹⁸⁸ Wigmore saw that the determination of facts at trial requires probabilistic inference based on observation and experiment.¹⁸⁹ I propose to turn that idea around and suggest that inductive reasoning *defines* fact-finding. That is, to find a fact means no more than to use inductive, probabilistic reasoning—to draw inferences that exceed the decision maker’s knowledge based on observed data.

But that does not end the matter. Influential philosophers have argued that all, or nearly all, meaningful reasoning is inductive.¹⁹⁰ And Holmes’ admonition that

¹⁸⁷ One way this question comes up is in the doctrine of superseding causes. Where an actor engages in negligent conduct that is the but-for cause of an injury, the actor is not liable if a superseding cause is present. See RESTATEMENT (SECOND) OF TORTS § 451 (1965). The *Restatement* gives as an example of a superseding cause an “[e]xtraordinary [f]orce of [n]ature [i]ntervening to [b]ring [a]bout [h]arm [d]ifferent [f]rom [t]hat [t]hreatened by [the] [a]ctor’s [n]egligence.” Determining whether an extraordinary force of nature will operate as a superseding cause thus requires, among other things, determining whether the harm it caused is different from the harm that would have been caused by the actor’s negligence alone. The decision maker must answer the question, “What harm would the actor’s negligence have caused if the force of nature had not intervened?”

¹⁸⁸ See Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 609 (1908) (describing and attacking formalist approaches to jurisprudence).

¹⁸⁹ WIGMORE, *supra* note 179, at 16.

¹⁹⁰ See GRAYLING, *supra* note 174, at 48 (describing positivism).

the life of the law has been experience rather than logic¹⁹¹ was meant to show that legal rules are themselves derived inductively.¹⁹² Thus, it will not do to suggest that *all* inductive, probabilistic reasoning constitutes fact-finding in the sense connoted by the fact-law distinction. The field of inquiry must be limited to the real world dispute at the center of the litigation.¹⁹³ This limitation leads to the following definition of "question of fact:" *A question of fact is one that requires for its answer inductive inferences about the transactions or occurrences in dispute.*¹⁹⁴

That formulation risks circularity, but, with some defining of terms, it does withstand scrutiny. Again, the role of the parties is key. In litigation, the plaintiff must always assert that some event or condition—defined broadly as above¹⁹⁵—occurred out in the real world and that that event or condition impacted the plaintiff or will impact the plaintiff in a negative way. The plaintiff thus sets the terms of the debate by identifying something that happened (or in some cases, will happen) causing an injury that the plaintiff claims is remediable in a court of law. The defendant also plays a role in delineating the events or conditions underlying the claims. The defendant may contest whether an event or condition occurred the way the plaintiff says it did and whether its impact on the plaintiff is as the plaintiff says it is. In addition, the defendant may assert that the plaintiff's story is incomplete—that other events or conditions occurred that have a logical

¹⁹¹ OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (1881) ("The life of the law has not been logic: it has been experience.").

¹⁹² See *id.* ("The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.").

¹⁹³ The failure to define the fact-finding function based on the transactions or occurrences in dispute has created problems for previous efforts to distinguish "fact" from "law." See Richard D. Friedman, *Standards of Persuasion and the Distinction Between Fact and Law*, 86 NW. U.L. REV. 916, 918 (1992). Professor Friedman states: "The fact-finding function is to determine that part of reality that is relevant to the adjudication of the action. We might think of this function as the reconstruction in imagination of that portion of reality, as if making a mental film." *Id.* Professor Friedman continues: "The law-determining function, then, is to prescribe the consequences to be attached to that aspect of reality." *Id.* The problem with this definition is that matters such as the congressional intent motivating a statute are clearly "part of reality that is relevant to the adjudication of the action." *Id.* Yet, every judge would conclude that, that is an issue of law.

¹⁹⁴ I use the phrase *transactions or occurrences* in the sense it has in the law relating to *res judicata* and compulsory counterclaims. See RESTATEMENT (SECOND) OF JUDGMENTS § 24 (1982) (defining "claims" in terms of transactions or series of transactions); FED. R. CIV. P. 13(a) (defining compulsory counterclaims in terms of transactions or occurrences).

¹⁹⁵ "Events or conditions" encompasses virtually all phenomena in the world, real or hypothetical, including the identity of things or persons, the occurrence of physical events or human acts, mental states, and relations of cause and effect.

connection to those posited by the plaintiff and that are necessary for a full understanding of the events or conditions described by the plaintiff. The “transactions or occurrences in dispute” are simply the events or conditions that the plaintiff has pointed to as causing his injury, plus the injury itself, plus logically connected events or conditions identified by the defendant.

As courts struggling to apply the doctrine of claim preclusion can attest, precisely delineating the transactions or occurrences in dispute can be difficult. But some guidelines exist. The transactions or occurrences in dispute always have a more or less direct logical connection to the parties. They include the conduct, condition, and mental states of the parties themselves, plus any other events or conditions, including conduct and mental states of other people, having a causal, spatial, or temporal connection to the conduct, condition, and mental states of the parties. Where a question calls for inductive inferences about these sorts of events or conditions, it requires inductive inferences about the transactions or occurrences in dispute and so constitutes a question of fact.

Note what is excluded by this definition. The definition excludes, among other things, questions calling for inferences about the conduct and mental states of legislators or others in constructing standards or rules of law that are ultimately determined to have a bearing on the resolution of the dispute.¹⁹⁶ Questions posed in litigation may call for inductive inferences about these matters, and such inferences may be crucial to the *resolution* of the dispute. But the parties will almost never assert that the conduct and mental states of legislators or others constitute the real-world events underlying their claims and defenses. In other words, plaintiffs very rarely argue that conduct undertaken by a legislative or judicial actor has caused the plaintiff an injury remediable in a court of law. Occasionally plaintiffs have attempted to tie their alleged injuries to such legislative action, and the result has usually been a determination that the plaintiff lacks standing—or in other words, that the plaintiff’s proposed question is inappropriate.¹⁹⁷

Another major category of inference excluded from the definition is the set of inferences about the consequences of the litigation itself, such as the effects on the parties or others of a verdict or award. Again, at various points in the litigation certain actors may consider the consequences of the litigation in deciding how to

¹⁹⁶ The distinction I draw here is roughly equivalent to the one between adjudicative and legislative facts. See FED. R. EVID. 201 advisory committee’s note.

Adjudicative facts are simply the facts of the particular case. Legislative facts, on the other hand, are those which have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body.

Id.

¹⁹⁷ See *supra* notes 156–173 and accompanying text (describing judge’s role in deciding whether question posed by parties is appropriate).

resolve the dispute. But the consequences of the litigation cannot be the events the plaintiff points to as a basis for seeking a remedy in a court of law.

Defining questions of fact in terms of inductive inferences about the transactions or occurrences in dispute leaves several important classes of questions of law. The category “question of law” includes, in addition to the screening questions described in the previous section, all “appropriate” questions calling for deductive inferences—regardless of their subject—and all “appropriate” questions calling for inductive inferences about matters outside the transactions or occurrences in dispute. Whenever a question requires the decision maker to label or characterize known real-world phenomena by reference to the decision maker’s pre-existing store of knowledge, it involves deductive inferences. And even if it requires the decision maker to draw conjectural inferences exceeding the decision maker’s pre-existing store of knowledge, so that it calls for inductive inferences, it does not involve a question of fact if the inferences relate to matters such as the intentions or purposes of a legislature or the likely actions of other people who are made aware of the outcome of the litigation.

To summarize, whenever a decision maker has a set of data about the transactions or occurrences in dispute in mind and is asked to draw further conjectural inferences about logically related real-world phenomena, a question of fact has been presented. On the other hand, whenever a decision maker has a set of data about the world in mind and is asked to make a judgment about that data by reference to 1) the decision maker’s own notions of fairness or justice, 2) the likely preferences of legislators or others in the past who might have anticipated similar circumstances, or 3) the likely future reactions of people to a decision one way or another, a question of law has been presented.

3. Demonstrating the Validity of the Inferential Account

The descriptive aspect of my argument entails a claim that, in practice, judges label questions as “fact” or “law” depending on the inferences involved, whether they realize it or not. To demonstrate that point—and to show the utility of my theory—I need to show the fact-law distinction at work in common-law situations. I do that in this section in two ways. First, I examine a single case in which the fact-law distinction played a central role to show how judges label questions as factual or legal depending on the inferences involved. Then, to show the validity of my approach more generally, I apply my approach to the issue of reasonableness, a doctrine that scholars have targeted as defying explanation under the fact-law distinction.

The California Supreme Court’s decision in *Loper v. Morrison*¹⁹⁸ provides a good starting point for demonstrating the inferential underpinnings of the fact-law

¹⁹⁸ 145 P.2d 1 (Cal. 1944).

distinction. In *Loper*, an employee of a milk company attempted to collect a delinquent account at the home of a customer.¹⁹⁹ Finding the customer not at home, he went with another employee to a tavern to await the customer's return.²⁰⁰ After leaving the tavern, he drove his fellow employee home, and then started back toward the customer's house.²⁰¹ While on the way, and while still outside his delivery area, he collided with the plaintiff's car, injuring the plaintiff.²⁰² The plaintiff brought suit against both the employee, for his negligence, and the employer, based on *respondeat superior*. The trial judge submitted the case to a jury, which returned a verdict for the plaintiff.²⁰³

The defendant employer appealed, arguing that the case against it should not have gone to the jury because the judge should have decided as a matter of law that the employee was not acting within the scope of his employment. Justice Traynor, writing in dissent, agreed. After stating that the extent of liability is a matter of law where the facts are undisputed, he argued that "[i]n the present case the court can determine better than the jury the extent of the vicarious liability to which the Arden Milk Company *should be* subject."²⁰⁴ He then noted:

[t]he undisputed evidence shows that it was no part of Morrison's duty to take Dolan home, and that he did so merely as a personal favor. The accident occurred on the way back from Dolan's home, some twenty blocks from the nearest point of Morrison's assigned territory. It is my opinion that Morrison was returning from a personal mission and had not resumed his employment at the time of the accident and was therefore not then acting within the scope of his employment.²⁰⁵

Traynor saw the question of whether the employee was acting in the scope of his employment as a normative matter. He looked at the apparent circumstances of the accident and asked whether the employer *should be* held liable. That was a question he could answer without drawing any further inferences about the events or conditions in question. He had only to evaluate the set of "undisputed" data against his own pre-existing notions of fairness, plus his knowledge of how other judges had treated similar situations and his speculations about the effect of a liability ruling on similarly situated actors in the future. For Traynor, therefore, the scope-of-employment question did not require inductive inferences about the transactions or occurrences in dispute. It was a question of law.

¹⁹⁹ *Loper v. Morrison*, 145 P.2d 1, 2 (Cal. 1944).

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.* at 2–3.

²⁰³ See *Loper v. Morrison*, 134 P.2d 311, 313–14 (Cal. App. 1943).

²⁰⁴ *Loper*, 145 P.2d at 7 (Traynor, J., dissenting) (emphasis added).

²⁰⁵ *Id.*

The majority took a very different approach. The majority saw the scope-of-employment question as turning on the states of mind of both the employee and the employer. The majority stated:

[T]he factors to be considered . . . are the intent of the employee, the nature, time, and place of his conduct, his actual and implied authority, the work he was hired to do, the incidental acts that the employer should reasonably have expected would be done, and the amount of freedom allowed the employee in performing his duties.²⁰⁶

That question could not be answered based solely on the apparent circumstances of the accident. The decision maker had to make additional inductive inferences, drawn from the known circumstances, about the employee's intent and the employer's expectations. While the majority recognized that in some cases the evidence would permit only one conclusion on those questions, so that the judge could decide the question as a matter of law, in this case multiple inferences were possible. Hence, a jury decision was required.²⁰⁷

The real dispute in *Loper* was over the appropriate question to be posed. In the defendant's view, liability should have turned on the question, "Should an employer be liable for the negligence of his employee where the employee injures someone after taking a detour from his job-related activities for personal reasons and before returning to his designated delivery area?" In the plaintiff's view, that was not an appropriate question. Instead, the plaintiff argued, implicitly, that the employer should be liable unless the employee intended to abandon his job-related activities and the employer had no reason to believe the employee would take the detour. Thus, for the plaintiff the dispositive question was "Did this employee intend to abandon his job-related activities and did the employer have reason to believe the employee would take a detour such as this while engaged in his job-related activities?" Again, the judge *always* has the exclusive authority to decide which questions should be asked. Once a majority of the appellate court determined that the plaintiff's question was the appropriate one, it had to decide whether the judge or jury should answer it. Because the plaintiff's question called for inductive inferences about the transactions or occurrences in dispute, it was a question of fact that had to go to the jury. The majority so held.

Other sorts of questions also call for inductive inferences about the transactions or occurrences in dispute, and these are not always as apparent. The concept of reasonableness provides a good example. Although the question of whether conduct was reasonable is typically assigned to the jury,²⁰⁸ courts and

²⁰⁶ *Id.* at 3-4.

²⁰⁷ *Id.* at 4.

²⁰⁸ See, e.g., *Louisville, E. & S.L.C.R. Co. v. Berry*, 36 N.E. 646, 650 (Ind. App. 1894) ("Within the whole range of judicial inquiry, there are but few questions that are more

commentators have hesitated to call it a question of fact, usually referring to it as a mixed question of law and fact.²⁰⁹ In one of the few articles of the last fifty years to treat the fact-law distinction in any detail, Professor Stephen Weiner focused on the criterion of reasonableness to show what he saw as the “inconsistency and confusion” inherent in the use of the fact-law terminology.²¹⁰

Indeed, courts have often seemed uncertain in labeling reasonableness, and with some justification. Reasonableness does involve both legal and factual characteristics. But distinguishing those elements is easier than it has appeared to be. In some legal contexts, the factual elements predominate; in others, the legal elements predominate. Once the relative weight is understood, it becomes clear that judges allocate decisions on the question of reasonableness in fairly consistent ways, explainable by reference to inferential criteria.

The most obvious and important use of the reasonableness standard is in the law of negligence. The *Restatement (Second) of Torts* defines the standard of conduct required to avoid being negligent as “that of a reasonable man under like circumstances.”²¹¹ It then further defines the standard of the reasonable man by stating that “[n]egligence is a departure from a standard of conduct demanded by the community for the protection of others against unreasonable risk.”²¹² In other words, the reasonable man behaves according to community standards for the protection of others against unreasonable risks. Finally, the *Restatement* defines unreasonableness:

Where an act is one which a reasonable man would recognize as involving a risk of harm to another, the risk is unreasonable and the act is negligent if the risk is

peculiarly and exclusively within the province of the jury than those of negligence and the want of contributory negligence.”).

²⁰⁹ See HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS* 355 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994). Hart and Sacks elided the problem by calling reasonableness a “standard”—something halfway between law and fact. *Id.* Others have also taken this approach. See, e.g., POSNER, *supra* note 175, at 44. Early on, Thayer pointed out the inefficacy of the label “mixed question of law and fact.” See JAMES BRADLEY THAYER, *A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW* 224–25 (1898).

All questions of fact, for a jury or for a court, are mixed questions of law and fact; for they must be decided with reference to all relevant rules of law; and whether there be any such rule, and what it is, must be determined by the court. Now since this mixture of law and fact is thus common to a variety of different situations, it is an un instructive circumstance to lean upon when one seeks for guidance in discriminating these situations.

Id.

²¹⁰ See Weiner, *supra* note 134, at 1876.

²¹¹ RESTATEMENT (SECOND) OF TORTS § 283 (1965) (“Unless the actor is a child, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable man under like circumstances.”).

²¹² *Id.* § 283 cmt. c.

of such magnitude as to outweigh what the law regards as the utility of the act or of the particular manner in which it is done.²¹³

This is simply another way of saying that reasonableness depends on the circumstances.²¹⁴ People might be justified in taking certain risks if taking those risks is the only way to avoid worse consequences.²¹⁵ The factors to be considered in determining the utility of the actor's conduct include "the extent of the chance that [an important] interest will be advanced or protected by the particular course of conduct" and "the extent of the chance that such interest can be adequately advanced or protected by another and less dangerous course of conduct."²¹⁶

The weighing of risk and utility prescribed in the definition of unreasonableness calls for counterfactual probabilistic inferences about the transactions or occurrences in dispute. In requiring an inference as to whether other courses of conduct that the actor might have taken would have produced the same benefits at less cost, the question of reasonableness requires the decision maker to speculate about how events might have unfolded if circumstances had been different. If other actions that could have been taken would not have

²¹³ *Id.* § 291; see also *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (postulating that conduct is negligent when the cost or burden of preventing the injury is less than the product of the probability of the injury and the loss resulting from the injury (B < PL)). The Tentative Draft of the new Restatement (Third) of Torts even more explicitly incorporates risk-benefit balancing in the definition of negligence:

A person acts with negligence if the person does not exercise reasonable care under all the circumstances. Primary factors to consider in ascertaining whether the person's conduct lacks reasonable care are the foreseeable likelihood that it will result in harm, the foreseeable severity of the harm that may ensue, and the burden that would be borne by the person and others if the person takes precautions that eliminate or reduce the possibility of harm.

RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 3 (Tentative Draft No. 1, 2001). For a critique of the Tentative Draft's treatment of risk-benefit balancing, see Stephen G. Gilles, *On Determining Negligence: Hand Formula Balancing, the Reasonable Person Standard, and the Jury*, 54 VAND. L. REV. 813 (2001).

²¹⁴ See *Prunty v. Doylestown Florabunda*, 1998 U.S. Dist. LEXIS 10349, *9 (E.D. Pa. July 14, 1998) (instructing jury that "[o]rdinary care is a relative term, not an absolute one. That is to say, in deciding whether ordinary care was exercised in a given case, the conduct in question must be viewed in the light of all the surrounding circumstances, as shown by the evidence of the case.").

²¹⁵ RESTATEMENT (SECOND) OF TORTS § 291 cmt. e (1965). The *Restatement* gives as an example a case in which "the legal rate of speed is exceeded in the pursuit of a felon or in conveying a desperately wounded patient to a hospital."

²¹⁶ *Id.* § 292. See also RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 3 cmt. e (Tentative Draft No. 1, 2001) ("Conduct is negligent if its disadvantages outweigh its advantages, while conduct is not negligent if its advantages outweigh its disadvantages.").

produced the same benefit at less cost, the actor's conduct was not unreasonable. Because this conclusion turns on hypothetical, probabilistic inferences about the actor's conduct—an essential component of the transaction or occurrence in dispute—it is a question of fact.

In some cases an allegedly negligent act is a bare omission—the actor had no benevolent purpose in mind—so that the utility of the conduct is nil or virtually nil. But even in such a case the decision maker must draw counterfactual probabilistic inferences about the transactions or occurrences in dispute. In every case, for conduct to be unreasonable, the actor must have been able to *recognize* the risk.²¹⁷ To decide whether an actor reasonably should have recognized the risk, the decision maker must recreate the events as they appeared to the defendant and then spin out hypothetical scenarios for how events would most probably unfold. The actor's conduct is unreasonable only if the series of events leading to the injury has some significant probability in comparison with other possible outcomes.²¹⁸ Injuries that are flukes—that are not expected because other non-injurious courses of events are much more probable under the circumstances—are not the product of negligence.²¹⁹ Thus, every reasonableness determination involves hypothetical, probabilistic judgments about the transactions or occurrences in dispute.

What makes the reasonableness question difficult to characterize is its invocation of community standards. The decision maker must compare the actor's conduct against the community standards for behavior under similar circumstances. Even if the probability of an injury was low and/or the relative utility of the conduct was high, an actor might be negligent if he failed to act in ways that community standards dictate for the situation. "If the actor does what others do, under like circumstances, there is at least a possible inference that he is conforming to the community standard of reasonable conduct; and if he does not do what others do there is a possible inference that he is not so conforming."²²⁰ Thus, a decision maker must answer the question, "What would a person of

²¹⁷ See RESTATEMENT (SECOND) OF TORTS § 289 (1965) ("The actor is required to recognize that his conduct involves a risk of causing an invasion of another's interest . . .").

²¹⁸ See *McFarlin v. Hall*, 619 P.2d 729, 734 (Ariz. 1980) ("The test of whether the duty of reasonable care is discharged is the probability or possibility of injury to the plaintiff.").

²¹⁹ See *McChargue v. Black Grading Contractors, Inc.*, 176 S.E.2d 212, 216 (Ga. Ct. App. 1970).

[T]he law requires a person to anticipate or foresee and guard against what usually happens and is likely to happen, but the law does not require a person to anticipate or foresee and provide against that which is unusual and not likely to happen, or, in other words, that which is only remotely and slightly probable. The general test in such cases is not whether the injurious result or consequence is possible, but whether it was probable, that is likely to occur according to the usual experience of persons.

Id.

²²⁰ RESTATEMENT (SECOND) OF TORTS § 295A cmt. b (1965).

ordinary prudence in this community do under these circumstances?"²²¹ Assuming the circumstances leading to the injury have been established—by assumption, agreement, or prior determination—answering that question does not involve factual inferences. Instead of drawing inductive inferences about the specific people and events involved in the matter, the decision maker must draw inductive inferences about how other people from the community would behave under similar circumstances. And almost inevitably, the decision maker's own preconceived notions about how people in the community *should* behave will creep into that analysis. Thus, determining the community standards involves inductive inferences about matters beyond the transactions or occurrences in dispute, as well as deductive inferences about those transactions or occurrences.

This inferential focus suggests that the determination of community standards is really a question of law.²²² Nevertheless, the question normally goes to the jury. Typically, the rationale for this choice is that juries are at least as well acquainted—if not better acquainted—with community standards for reasonableness than the judge. In *Sioux City & Pac. R.R. v. Stout*,²²³ the Supreme Court summed this rationale up as follows:

Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer; these sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. . . . It is assumed that twelve men know more of the common affairs of life than does one

²²¹ See *Prather v. Brandt*, 981 S.W.2d 801, 810 (Tex. App. 1998). The court approved the following jury instructions:

"Negligence" means failure to use ordinary care, that is, failing to do that which a person of ordinary prudence would have done under the same or similar circumstances or doing that which a person of ordinary prudence would not have done under the same or similar circumstances.

....

"Ordinary care" means that degree of care that would be used by a person of ordinary prudence under the same or similar circumstances.

Id.

²²² See Oliver Wendell Holmes, Jr., *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 457 (1899) ("[E]very time that a judge declines to rule whether certain conduct is negligent or not he avows his inability to state the law . . .").

²²³ 84 U.S. (17 Wall.) 657 (1873).

man, that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge.²²⁴

Whether or not the determination of community standards is a question of “law,” then, courts have the sense that the jury is often more competent than the judge to make that determination.²²⁵ That is not a problem for my Seventh Amendment analysis. While it would be inappropriate to assign “preliminary” law questions, such as the admissibility of evidence, to the jury, it is not inappropriate to assign this type of law question to the jury. Juries answer such law questions whenever they give general verdicts. Because it does not include a right to a non-jury trial,²²⁶ the Seventh Amendment poses no bar.

I spend some time discussing this aspect of reasonableness because understanding the interplay of the standard of conduct and the determination of negligence is critical to understanding the fact-law distinction. Professor Weiner recognized that determining the standard of conduct is not really a question of fact. But he then made an unwarranted jump: seeing that the determination of the governing standard is not really a fact question, he criticized courts for calling *the*

²²⁴ *Sioux City & Pac. R.R. v. Stout*, 84 U.S. (17 Wall.) 657, 664 (1873). *See also* *Louisville, E. & S.L.C.R. Co. v. Berry*, 36 N.E. 646, 650 (Ind. App. 1894). The Indiana Court of Appeals explained:

The jurors, in their callings and experiences, have usually come in contact with, and observed, the conduct of men under varied conditions. It is this diversity which gives value to their unanimous judgment. Collectively, they are more capable of determining how an ordinarily prudent man would act under given conditions than judges of courts, whose experiences are usually confined to one calling, and who are proverbially prone to generalize and follow precedents.

Id.

²²⁵ Jurors do not always determine the governing standard. *See* RESTATEMENT (SECOND) OF TORTS § 285 (1965) (providing that applicable standards of conduct may be provided by legislation or judicial decision). Judges have often prescribed standards of conduct, particularly in recurring situations such as railroad accidents. *Id.* § 285 cmt. e. Such judicial intervention is appropriate given that the determination of a governing standard does not involve inductive inferences about the particular actors and events in dispute, and is often largely a policy-based, normative judgment.

²²⁶ *See* *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 510 (1959) (“[N]o [constitutional] requirement protects trials by the court . . .”). *See generally* Note, *The Right to a Nonjury Trial*, 74 HARV. L. REV. 1176 (1961). A litigant might have an argument under the due process clause that preliminary questions traditionally recognized as raising legal issues must be answered by the judge. *See* U.S. CONST. amend. V.

application of the standard to established conduct a fact question.²²⁷ The Tentative Draft of the new *Restatement (Third) of Torts* seems to make the same jump by concluding, with little explanation, that the determination of negligence is a question of law.²²⁸

Again, there is some validity to this understanding. Once the decision maker has both the community standards and the circumstances leading to the injury in mind, comparing the two requires a simple deductive inference: the actor's conduct either does or does not fit the applicable standards. In at least some cases, then, the question of whether conduct is unreasonable is one of law. The *Restatement (Second)* recognizes this point, stating that "where there is nothing in the situation or in common experience to lead to the contrary conclusion, this inference may be so strong as to call for a directed verdict . . ."²²⁹

But the *Restatement* makes clear that the application of community standards alone will seldom establish negligence; the decision maker must consider the probability of the risk in each individual case. "Any such custom is . . . not necessarily conclusive as to whether the actor, by conforming to it, has exercised the care of a reasonable man under the circumstances, or by departing from it has failed to exercise such care."²³⁰ Thus, inductive inferences about the transactions

²²⁷ See Weiner, *supra* note 134, at 1881. Weiner stated that:

It is submitted that a most significant feature of [*Stout*] is its refusal to say that the issue should be submitted to the jury because it is one of fact, or conversely that the issue is one of fact because it should be submitted to the jury. Instead, the Court simply concluded that the jury was better qualified than the judge to apply the standard of "proper care" to the undisputed facts.

Id.

²²⁸ See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 8 cmt. b (Tentative Draft No. 1, 2001). The Tentative Draft provides:

In light of the facts relating to the actor's conduct, the question arises whether that conduct is negligent: whether it lacks reasonable care under all the circumstances. Because this is a matter of the law's evaluation of the legal significance of the actor's conduct, such a question could be characterized as a question of law that should be decided by the court. More precisely, it can be characterized as a mixed question of law and fact.

Id.

²²⁹ RESTATEMENT (SECOND) OF TORTS § 295A cmt. b (1965). See also RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 13 cmt. d (Tentative Draft No. 1, 2001) ("In some cases a custom is such that it induces general reliance by virtually all those participating in an activity; to this extent, custom establishes the standard by which those engaging the activity assume they are bound.").

²³⁰ RESTATEMENT (SECOND) OF TORTS § 295A cmt. c (1965). See also RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 13(a) (Tentative Draft No. 1, 2001) ("An actor's compliance with the custom of the community, or of others in like circumstances, is evidence that the actor's conduct is not negligent but does not preclude a finding of negligence.").

or occurrences in dispute are always presumptively a part of the reasonableness analysis, although there might be cases in which reasonable people could reach only one conclusion. While the determination of the governing standard may be a question of law (albeit one that typically goes to the jury), the determination that conduct was or was not reasonable is a question of fact.

In other legal contexts, reasonableness is not imbued with the factual characteristics that it has in the law of negligence. As an example of the confusion surrounding the concept of reasonableness, Professor Weiner pointed to the treatment of reasonableness in the doctrine of malicious prosecution.²³¹ To be liable for malicious prosecution, a person must have initiated criminal proceedings against an innocent person "without probable cause."²³² Probable cause exists if the accuser "reasonably believes" that the accused has committed a crime. As Professor Weiner pointed out, courts that give the question of reasonableness to the jury in a negligence case typically reserve for themselves the question of whether a malicious prosecution defendant had a reasonable belief in the guilt of the accused.²³³

That apparent discrepancy makes sense when seen as an application of the inferential account of the fact-law distinction. Determining reasonableness in a negligence case entails making hypothetical, probabilistic inferences about the nature of the defendant's conduct. But determining whether a person had a reasonable belief in the guilt of another requires no inductive inferences about the transactions or occurrences in dispute, once the circumstances as they appeared have been established by assumption, agreement, or prior determination. According to Prosser, "[p]robable cause is judged by appearances to the defendant at the time he initiates prosecution The appearances must be such as to lead a reasonable person to set the criminal process in motion."²³⁴ The defendant's subjective belief is irrelevant,²³⁵ and whether the accused actually committed the crime is also irrelevant.²³⁶ All that matters is that a reasonable person would conclude—based solely on appearances at the time—that a crime had been committed. A decision maker tasked with making that decision needs nothing but his own sense of how to characterize events in the world. The

²³¹ See Weiner, *supra* note 134, at 1910–12. Thayer also used the malicious prosecution example to demonstrate the confusion surrounding the fact-law distinction. See THAYER, *supra* note 209, at 252.

²³² RESTATEMENT (SECOND) OF TORTS § 653 (1965).

²³³ See *id.* § 673 (1) (1965) ("In an action for malicious prosecution the court determines whether . . . (c) the defendant had probable cause for initiating and continuing the proceedings . . .").

²³⁴ PROSSER AND KEETON ON THE LAW OF TORTS 876 (W. Page Keeton et al. eds., 5th ed. 1984).

²³⁵ *Id.* at 877.

²³⁶ *Id.* at 876. That the defendant was in fact guilty is the basis for a separate defense to the charge of malicious prosecution.

decision maker simply compares the apparent conduct of the accused with the decision maker's storehouse of knowledge about what constitutes apparent criminal conduct. The decision maker does *not* draw any conclusions about whether a crime actually was committed. No hypothetical inferences about how events would play out, nor any other inductive inferences about the circumstances at issue, are required.

Reasonableness, in this context, is a matter of law. And courts have consistently treated it as such. In fact, this is one of the rare instances in which good evidence for English common-law practice is available. In a noted case, Lords Mansfield and Loughborough declared that "[t]he question of probable cause is a mixed proposition of law and fact. Whether the circumstances alleged to shew it probable, or not probable, are true and existed, is a matter of fact; but whether, supposing them true, they amount to a probable cause, is a question of law"²³⁷ The Lords thus parsed the factual and legal elements exactly as I suggest. Determining the circumstances as they appeared to the defendant is a question of fact; determining whether a reasonable person looking at those circumstances would conclude that a crime has been committed is a question of law.

IV. THE SUPREME COURT'S SEVENTH AMENDMENT JURISPRUDENCE: A CRITIQUE

The Supreme Court's recent Seventh Amendment decisions offer both a window on the Court's thinking about questions of decisional responsibility and a forum for testing the inferential account. The cases provide an opportunity to show how importing an inferential conception of the fact-law distinction into the Seventh Amendment can help resolve real problems in allocating decisional responsibility between judge and jury. I treat the cases in pairs. *Markman v. Westview Instruments, Inc.*²³⁸ and *City of Monterey v. Del Monte Dunes, Ltd.*,²³⁹ which I cover first, both involve liability determinations and in both cases the Court advocated an approach to the allocation of decisional responsibility turning on "functional considerations." *Tull v. United States*²⁴⁰ and *Feltner v. Columbia Pictures Television, Inc.*,²⁴¹ the second pair, both involve remedies questions arising under federal statutes, and in both cases the Court struggled with how to apply the Seventh Amendment to remedies issues. My analysis of these cases demonstrates my basic point: although they may not be able to express why,

²³⁷ *Johnstone v. Sutton*, 99 Eng. Rep. 1225, 1243–44 (Ex. 1786), *aff'd*, 99 Eng. Rep. 1377 (H.L. 1787).

²³⁸ 517 U.S. 370 (1996).

²³⁹ 526 U.S. 687 (1999).

²⁴⁰ 481 U.S. 412 (1987).

²⁴¹ 523 U.S. 340 (1998).

judges see something distinctive about questions of “fact” and generally label them appropriately. In my view, three of the four cases were decided correctly. Not coincidentally, the one that I conclude was not decided correctly, *Tull*, presents the most difficult issues.

A. *Liability Questions and “Functional Considerations”*: *Markman* and *Del Monte Dunes*

The Supreme Court in *Markman* introduced an apparently novel consideration into its Seventh Amendment jurisprudence by relying on “functional considerations” to find that a judge may permissibly construe the claims in a patent. The Court cited *Miller v. Fenton*²⁴² for the proposition that the fact-law distinction can be understood, at least in part, to incorporate such functional considerations. The Court’s analysis here is unsatisfying in several ways. *Miller v. Fenton* did not address the allocation of responsibility between judge and jury—the central question in *Markman*. *Miller* was a *habeas corpus* case in which the convicted defendant claimed that his custodial confession should have been suppressed as involuntary by the state trial court. The federal district court dismissed the *habeas* petition and the Third Circuit affirmed, holding that the voluntariness of the confession was a “factual issue” under 28 U.S.C. § 2254(d), which commands deference to state court findings-of-fact.²⁴³ The Supreme Court reversed that decision. It concluded that voluntariness is either a legal question or a mixed question of law and fact, and that in either case it is subject to plenary federal review.²⁴⁴

Voluntariness is an aspect of the decision as to whether a particular datum—the confession—should be put before the ultimate decision maker. Decisions about what data may be put before the decision maker are screening decisions that are always considered questions of law.²⁴⁵ *Miller* is thus a case asking which judge should decide what is indisputably a “judge” question. Although the answer to that question is itself framed in terms of the distinction between factual and legal determinations, it does not implicate the Seventh Amendment’s right to a jury trial. It is, rather, a matter of ordinary statutory interpretation. To the extent

²⁴² 474 U.S. 104 (1985).

²⁴³ *Miller v. Fenton*, 474 U.S. 104, 108 (1985). See 28 U.S.C. § 2254(d) (1982), amended by 28 U.S.C. § 2254(e) (1996).

In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction . . . shall be presumed to be correct

Id.

²⁴⁴ *Miller*, 474 U.S. at 110–12.

²⁴⁵ See *supra* notes 143–48 and accompanying text.

the question of whether a trial judge or appellate judge should decide a legal question raises constitutional concerns, they involve the due process clause.²⁴⁶ In that context, it is entirely appropriate to consider which judicial actor is better suited to make the decision “as a matter of the sound administration of justice.”²⁴⁷

Litigants in appropriate civil cases, on the other hand, have a constitutional right to a jury trial of fact issues. The framers of the constitution performed a “functional” analysis in 1791 and concluded that juries are better suited than judges to decide questions of fact in actions at law. We are stuck with that choice to the extent we can determine which questions are “factual.” The Court in *Markman* seemed to recognize that point; it simply perceived insurmountable obstacles to identifying questions of fact. Ironically, though, the *Markman* Court’s own analysis of patent law and precedent dispels that notion and, in the process, shows how an inferential understanding of the fact-law distinction may actually undergird the decision.

The Patent Act requires a patent seeker to provide specifications for his invention that “contain a written description of the invention . . . in such full, clear, concise, and exact terms as to enable any person skilled in the art . . . to make and use the same,” and that “conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.”²⁴⁸ The Federal Circuit seized on this language in its decision in *Markman*. It concluded that the statutory requirement that claim language be clear, in conjunction with the oversight of the Patent Office, removed the possibility of ambiguity in claim terms. As a result, the Federal Circuit treated patent claims as quasi-public writings, the terms of which could not be varied by the parties.²⁴⁹

This way of construing patents rests on an assumption that the scope of the patent is exactly what the words of the patent describe. The question of what the patent covers—in other words, claim construction—is nothing more than a determination of the literal meaning of the words in the claims. Answering that question requires no inductive inferences about the parties’ intentions or any other part of the transactions or occurrences in dispute. In the court’s words, “the focus in construing disputed terms in claim language is not the subjective intent of the parties to the patent contract when they used a particular term.”²⁵⁰ Instead, “the focus is on the objective test of what

²⁴⁶ See *In re Japanese Elec. Prods. Antitrust Litig.*, 631 F.2d 1069 (3d Cir. 1980) (finding complexity exception to right to jury trial based on due process clause).

²⁴⁷ See *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 388 (1996) (quoting *Miller v. Fenton* 474 U.S. 104, 114 (1985)).

²⁴⁸ 35 U.S.C. § 112 (2000).

²⁴⁹ *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 986–87 (Fed. Cir. 1995) (en banc).

²⁵⁰ *Id.* at 986.

one of ordinary skill in the art at the time of the invention would have understood the term to mean.”²⁵¹

Claim construction may require extrinsic evidence, but it is evidence of the technical meaning of the terms as an objective matter:

Extrinsic evidence, therefore, may be necessary to inform the court about the language in which the patent is written. But this evidence is not for the purpose of clarifying ambiguity in claim terminology. It is not ambiguity in the document that creates the need for extrinsic evidence but rather unfamiliarity of the court with the terminology of the art to which the patent is addressed.²⁵²

This use of extrinsic evidence, in the Federal Circuit’s view, is similar to a court’s reliance on legislative history in interpreting a statute.²⁵³ In both cases, the court engages in inductive inference, but the inference is to how people not involved in the dispute—legislators in one case, people “skilled in the art” in the other—would understand the meaning of the words at issue.

With much less exegesis, the Supreme Court adopted a similar understanding of patent interpretation. Its reasoning is best shown in its treatment of *Bischoff v. Wethered*,²⁵⁴ on which *Markman* had relied. The plaintiff in *Bischoff* had contracted for the assignment of a patent. He later determined that a prior patent had been awarded for an identical invention. If that were true, the presence of the prior patent would nullify the patent he purchased. He brought an action for breach of contract, in which the central issue was whether the two inventions were in fact identical.²⁵⁵ In other words, the case turned on whether an infringement action would succeed if one were brought. The Supreme Court held that all issues should go to the jury, including the construction of the potentially infringing patent.²⁵⁶

The Court understood the construction of the patent to require the mental recreation of the invention. The Court described the subject-matter of the patent as “an embodied conception outside of the patent itself.”²⁵⁷ The Court concluded that “[t]his outward embodiment of the terms contained in the patent is the thing invented, and is to be properly sought, like the explanation of all latent ambiguities arising from the description of external things, by evidence in pais.”²⁵⁸ Thus, the Court saw the jury’s role as mentally

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Id.* at 987.

²⁵⁴ 76 U.S. (9 Wall.) 812 (1869).

²⁵⁵ *Id.* at 812.

²⁵⁶ *Id.* at 814–15.

²⁵⁷ *Id.* at 815.

²⁵⁸ *Id.* at 815.

recreating the invented products based on the patents and the expert testimony, and then comparing the “invention” described in the first patent to the “invention” described in the second patent to decide whether they are the same.

The Supreme Court in *Markman* rejected that approach to patent law. While it recognized that a “novelty” action such as *Bischoff* might turn on the outward embodiment of the patent, it maintained that a patent infringement action turns on simple document interpretation.²⁵⁹

Where technical terms are used, or where the qualities or substances or operations mentioned of any similar data necessary to the comprehension of the language of the patent are unknown to the judge, the testimony of witnesses may be received upon these subjects, and any other means of information be employed. But in the actual interpretation of the patent the court proceeds upon its own responsibility, as an arbiter of the law, giving to the patent its true and final character and force.²⁶⁰

Bischoff adopted an understanding of patent law that would require the decision maker to draw inductive inferences about the transactions or occurrences in dispute (the outward embodiment of the patented product). In turn, the *Bischoff* Court saw patent claim construction as a question of fact for the jury. *Markman* rejected that understanding in favor of an approach focusing on the literal meaning of the words contained in the patent. That approach requires no inductive inferences about the transactions or occurrences in dispute. Accordingly—and rightly given its understanding of what claim construction actually involves—the *Markman* Court saw patent claim construction as a question of law for the judge.

In *Del Monte Dunes*, the Court relied heavily on language from *Markman*. But the *Del Monte Dunes* Court effectively used the focus on the different capabilities of judges and juries advocated in *Markman* to emphasize the jury’s primary role of deciding questions of fact. Again, *Del Monte Dunes* involved a takings claim, in which the plaintiff had to establish either that “Del Monte Dunes had been denied all economically viable use of its property or that the city’s decision to reject the plaintiff’s 190 unit development proposal did not substantially advance a legitimate public purpose.”²⁶¹

The Supreme Court, although citing *Markman* for its reliance on historical, precedential, and functional considerations, engaged in a relatively subtle analysis of the fact-law distinction. The Court concluded that the issues of whether the plaintiff had been deprived of all economically viable use of his property and

²⁵⁹ *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 386–87 (1996).

²⁶⁰ *Id.* at 388 (quoting 2 W. ROBINSON, LAW OF PATENTS § 732, at 481–83 (1890)).

²⁶¹ *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 700 (1999) (internal quotes omitted).

whether the regulation substantially advances legitimate public interests were both fact questions requiring a jury decision.²⁶² But the Court also noted that the question of whether the statutory purposes were legitimate—leaving aside the question of whether the regulation advanced those purposes—was arguably a question of law suitable for determination by the judge.²⁶³

As usual in cases invoking the fact-law distinction, the Court's reasoning as to why an issue is factual is left largely unstated. But, also as usual, the Court's instincts are good. The question of whether all economically viable use of the property has been eliminated clearly involves inductive inferences about the transactions or occurrences in dispute. The decision maker looks at the property subject to the restrictions and then makes probabilistic judgments about what beneficial uses might be made of the property with the regulations in place. That involves a hypothetical inference about the relationship between the two key elements in the dispute—the property and the regulations. The question is one of fact under my approach and so should go to the jury, just as the Court held.

The question of whether the regulation substantially advances a legitimate governmental interest is also factual. The decision maker was presented with a set of governmental interests. It was then asked whether the regulations bore a reasonable relationship to those objectives. To make that determination, the decision maker had to draw probabilistic inferences about the effects of prohibiting the landowner's desired uses of the property and substituting the uses prescribed by the government. Again, that means drawing inductive inferences about the transactions or occurrences in dispute (the nature of the property and the effect of the regulations). The question must go to the jury, as the Court held.

The Court was also correct to suggest that determining what constitutes a legitimate government interest is a question of law.²⁶⁴ Whether a regulatory objective is legitimate depends solely on considerations of public policy. While inductive inferences may be needed to draw policy-based conclusions, they are not inferences about the transactions or occurrences that underlie the plaintiff's claim. They involve normative judgments about the proper functions of government in general. The need for such inferences is one of the hallmarks of a question of law.

Despite their ostensible focus on functional considerations, then, both *Markman* and *Del Monte Dunes* allocate decisional responsibility according to the fact-law dichotomy and distinguish questions of fact from questions of law in accordance with inferential criteria. They at least bolster my descriptive argument about how courts understand and apply the fact-law distinction. On a normative

²⁶² *Id.* at 721.

²⁶³ *Id.* at 722.

²⁶⁴ *See id.* This aspect of the opinion is dicta, and is phrased hypothetically. *Del Monte Dunes* did not challenge the constitutionality of the city's regulatory objectives. The Court was speculating about what might be the result if such a challenge were made.

level, they may also be understood to require resort to inferential criteria in the allocation of decisional responsibility under the Seventh Amendment.

B. *The Remedies Problem: Tull and Feltner*

The Court has struggled to fit remedies questions into the Seventh Amendment framework. In *Tull*, the Court seemed to suggest that the Seventh Amendment has no bearing on remedies decisions. But the Court reversed course on that issue just a few years later, in *Feltner*. I will argue that *Tull* was wrongly decided, and that remedies questions are subject to the same fact-law analysis as liability questions, so that my approach removes this source of confusion.

In *Tull*, the Court considered whether the Seventh Amendment requires a jury decision on the assessment of civil penalties under the Clean Water Act. The Court concluded that the Seventh Amendment operates to preserve “[o]nly those incidents which are regarded as fundamental, as inherent in and of the essence of the system of trial by jury.”²⁶⁵ In reasoning leaving much to be desired, the Court then concluded that the assessment of civil penalties is not a fundamental element of a jury trial because Congress has the power to fix the amounts of those penalties statutorily.²⁶⁶ The Court did not frame this issue in terms of whether the assessment of the civil penalty is a question of fact, perhaps out of a sense that remedies questions simply fall outside the fact-law rubric. It discussed “the assessment of the civil penalty” as an abstract matter, without focusing on what sorts of judgments a decision maker must make to decide on a penalty amount. The Court did, however, cite the factors to be considered in a footnote, and an examination of those factors shows both that this is a close case and that the majority probably got it wrong.

The Clean Water Act directs a court, in assessing civil penalties, to consider “the seriousness of the violations, the economic benefits accrued from the violations, prior violations, good-faith efforts to comply with the relevant requirements, and the economic impact of the penalty.”²⁶⁷ Thus, answering the

²⁶⁵ *Tull v. United States*, 481 U.S. 412, 426 (1987).

²⁶⁶ *Id.*

²⁶⁷ *Id.* at 423 n.8. At the time the Court heard arguments in *Tull*, these factors were enunciated only in the EPA’s regulatory policy. Subsequently, the Clean Water Act was amended to incorporate them directly. *Id.* See 33 U.S.C. § 1319(d) (2000). The amended Act provides:

In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require.

Id.

question, "What amount of civil penalties should be assessed?" requires answering whether each of those factors is present. To the extent they call for inductive inferences about the transactions or occurrences in dispute, those factors raise fact questions.

Assuming that there is only one set of data about the external reality before the decision maker, because of assumption, agreement, or prior determination, evaluating the "seriousness of the violations" does not involve questions of fact. The decision maker simply compares the circumstances determined to constitute the "violations" against the decision maker's background notions of "seriousness." No inductive inferences about the circumstances are required, so this is a question of law.

In contrast, determining "the economic benefits accrued from the violations," "prior violations," and "good-faith efforts to comply with the relevant requirements" clearly requires inductive inferences about the nature of the violator's conduct and mental state, matters essential to the transactions or occurrences in dispute. These are fact questions that should be answered by the jury.²⁶⁸ Of course, to the extent that, in a particular case, a jury identifies or the parties agree on the economic benefits, the prior violations, and the good-faith efforts to comply, a judge could weigh those factors against the seriousness of the offense without the need for further inductive inferences about the transactions or occurrences in dispute. The mere weighing of those factors is an application of normative considerations of justice—a matter of law. The judge could perform that function without abridging the right to a jury under the Seventh Amendment.

Evaluating the economic impact of the penalty on the violator involves inductive inferences, but not about the transactions or occurrences in dispute. Instead of determining what effects will or would have flowed from the conduct of the parties, the decision maker must make a probabilistic judgment about the consequences that are likely to follow from the *decision maker's* own actions in imposing a remedy. Although that decision concerns one of the parties, it involves the outcome of the litigation rather than the events or conditions that underlie the plaintiff's claim. It is, therefore, a question of law that the judge may decide.

The fact that the assessment of a civil penalty includes significant legal aspects makes the Court's decision in *Tull* seem acceptable. The Court may even have intuited the importance of the legal questions as a basis for assigning the decision to the judge. Arguably, whether the jury or the judge should assess the penalties could be decided on a case-by-case basis depending on which factors predominate. But questions about the economic benefits of the conduct and the

²⁶⁸ With respect to "prior violations," they involve the transactions or occurrences in dispute if they relate to the circumstances for which liability has been assessed. To the extent they involve different properties, different conduct, and significantly different time frames, they may be so removed as not to involve the transactions or occurrences in dispute. In that case, determining the prior violations would not constitute a question of fact.

good-faith efforts to comply with the regulations lie too close to the heart of the dispute to be usurped by the judge in any case in which they are seriously contested. These are questions of fact, and a civil litigant with a right to a jury trial who puts data addressing them before the factfinder has a right to jury decision under the Seventh Amendment.

Feltner, which involved the assessment of statutory damages under Copyright Act, reprises the issues raised in *Tull* and in some respects repudiates *Tull*. The Court relied primarily on the historical test to find that the Seventh Amendment required a jury decision on the amount of statutory damages, both because of the traditional preference for jury determinations of damages and because of the fact that juries determined damages under the original Copyright Act of 1831.

The Court's decision in *Feltner* is unfortunate in that it confuses the question of whether some right to a jury applies with the question of whether the jury should decide a particular question. Under established precedent, for better or worse, the former turns on the law-equity distinction, analyzed through the historical test. The Court properly invoked that test to decide that a jury right applies in a copyright damages case. Following in the footsteps of *Markman*, however, the Court then extended the historical analysis to the analytically distinct question of whether a jury should decide on the amount of statutory damages. The Court never discussed the actual question posed and answered in the district court. Its analysis focused on "statutory damages" in the abstract, without ever considering the inferences required to determine damages under the specific statutory command at issue.

The statutory damages provision of the Copyright Act contains two sections. The first section offers the copyright owner the option of electing, instead of actual damages and profits, damages of from \$500 to \$20,000 "for all infringements involved in the action, with respect to any one work . . . as the court considers just."²⁶⁹ Courts have consistently interpreted that provision to allow for an award of from \$500 to \$20,000 for each act of infringement. The second section allows for adjustments to the amounts awarded under the first section. Where the copyright owner shows that the violations were "committed willfully," the award for each infringement may be increased to a sum of not more than \$100,000. Where the infringer shows that he or she "was not aware and had no reason to believe that his or her acts constituted an infringement," the award for each infringement may be reduced to a sum of not less than \$200.²⁷⁰

Assuming that there is a body of data about the circumstances of the infringement on which the parties have agreed or assumed or that have already been determined, applying Section 1 of the Act requires no inductive inferences about the transactions or occurrences in dispute. A decision maker applying

²⁶⁹ See 17 U.S.C. § 504(c)(1) (2000).

²⁷⁰ See *id.* § 504(c)(2).

Section 1 must answer two questions: “How many acts of infringement were there?” and “What constitutes a ‘just’ award for each act of infringement?” To answer the first question, the decision maker simply considers the circumstances of the infringement and decides how to segregate them into discrete acts. No further inductive inferences about what happened are required. To answer the second question, the decision maker refers to his or her normative conceptions of justice, considering factors such as “the circumstances of the infringement, . . . and the efficacy of the damages as a deterrent to future copyright infringement.”²⁷¹ Again, no further inductive inferences about the transactions or occurrences in dispute are required.²⁷²

Applying Section 2 of the Act, however, does require inductive inferences about the transactions or occurrences in dispute. Here the decision maker must determine whether the infringement was willful, or, the converse, whether the infringer was not aware of the infringement. These questions require an inference about the mental state of the infringer. Inferences about the mental state of the parties are inductive inferences about the transactions or occurrences in dispute. They are “factual” in my sense, and so must go to the jury under the Seventh Amendment.

In *Feltner*, Columbia put in evidence of willfulness, and the court found that Feltner had acted willfully.²⁷³ The Supreme Court could have seized on that component of the decision as a basis for finding that the determination of statutory damages was a fact question for the jury. Instead, the Court embarked on a historical analysis that, while providing a relatively determinate answer in this case, has shown limited utility in many others.²⁷⁴ Moreover, the Court’s analysis suggests that *any* question respecting the amount of statutory damages under the Copyright Act must go to the jury. In fact, only the inquiry into the defendant’s state of mind constitutes a question of fact for which a jury decision is required. A court could give that question to the jury on a special verdict and then decide the amount of damages to be awarded based on the jury’s findings. A decision on the amount of damages under that scenario would not involve any

²⁷¹ *Video Views, Inc. v. Studio 21, Ltd.*, 925 F.2d 1010, 1015 (7th Cir. 1991) (quoting *F.E.L. Publ’ns Ltd. v. Catholic Bishop of Chicago*, 754 F.2d 216, 219 (7th Cir. 1985)).

²⁷² The question of deterrence might be considered factual if it involved specific deterrence between the parties. That is, if there were a concern that *this* defendant might continue to infringe on *this* plaintiff’s intellectual property, the deterrence question would involve inductive inferences about the future conduct of the parties to the dispute. But to the extent the deterrence question focuses on potential infringers in general, or even on this defendant with respect to its likelihood of infringing on others in the future, the question does not entail inductive inferences about the transactions or occurrences in dispute, and so is not factual.

²⁷³ *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 344 (1998).

²⁷⁴ See *Ross v. Bernhard*, 396 U.S. 531, 538 n.10 (1970) (describing “abstruse historical inquiry” as “difficult to apply”).

additional inductive inferences about the transactions or occurrences in dispute. It would involve only normative considerations of justice and deterrence. Although a court could choose to give that question to the jury, failing to do so would not abridge the right to a jury under the Seventh Amendment.

V. CONCLUSION

Several points emerge from this discussion. As an initial matter, the term “question of law” has at least three distinct senses. First, it refers to the screening decisions a judge makes about whether the matter can proceed in a particular forum and about the data and questions that should be put before the tribunal. Second, it refers to decisions about the contestability of specific data or proposed questions. When the judge concludes that a datum must be accepted as accurately portraying external reality or that a question can be answered only one way, his decision to that effect is designated a matter of law, even if the decision involves factual inferences. Finally, it refers to appropriate and contestable questions for which no jury decision is required.

The last sense is the one in which the fact-law distinction and the Seventh Amendment intersect. Under the Seventh Amendment, questions of fact must go to the jury; questions of law may permissibly be decided by the judge. A question of fact is one that requires inductive inferences about the transactions or occurrences in dispute. A question of law is one that requires either deductive inferences or inductive inferences about matters beyond the transactions or occurrences in dispute, such as the intentions of legislators or other judges and the likely effect of a decision on the future conduct of other people. The Supreme Court’s recent Seventh Amendment decisions either implicitly or explicitly employ this distinction. Courts applying the Seventh Amendment to assign decisional responsibility *should* employ it explicitly.

Judicial decisions applying the fact-law distinction demonstrate courts’ intuitive ability to separate questions of law from questions of fact based on the inferences required. They also demonstrate, however, the ease with which courts can manipulate the jury right by adopting rules of law that call for “legal” rather than “factual” questions. Inevitably, if the jury right is tied to the determination of fact questions, courts can minimize the impact of the right by minimizing the fact questions required to prevail on a particular legal theory. That is what the Supreme Court did in *Markman*, the most controversial of the Court’s recent Seventh Amendment decisions. It constructed a doctrine of patent infringement under which the determinative question does not require inductive inferences about the events or conditions underlying the plaintiff’s claims. It then properly assigned that question to the judge.

Markman has been criticized for usurping the jury's role in patent litigation.²⁷⁵ Some of that criticism takes issue with the decision on Seventh Amendment grounds.²⁷⁶ The criticism may very well be justified as a policy matter—there may be reasons why we think juries should play a bigger role in patent litigation than *Markman* seems to allow. But those sorts of policy arguments find no support in the Seventh Amendment. The Seventh Amendment does not compel adherence to any particular legal doctrine. It simply says that whenever a doctrine calls for a decision on a question of fact, the decision must go to the jury (assuming the cause of action is one to which the Seventh Amendment applies). There will always be the potential for judges to construct legal doctrines that skew the decisionmaking process toward the judge by minimizing fact questions. At least in some cases, appellate courts and legislatures can act as a check on inappropriate judicial behavior. In the end, though, we have no choice but to rely on judges to interpret and construct legal rules in ways that comport with precedent and that respect fundamental rights, including the right to a jury trial.²⁷⁷

²⁷⁵ See Theresa M. Seal, Casenote, *The Jury Is Out: Supreme Court Confirms Construction of Patent Claim Falls Within Exclusive Province of the Court*, 22 S. ILL. U. L.J. 785 (1998).

²⁷⁶ See Louis Silvestri, Note, *A Statutory Solution to the Mischiefs of Markman v. Westview Instruments, Inc.*, 63 BROOKLYN L. REV. 279 (1997).

²⁷⁷ See generally RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977) (arguing that judges do and should rely on rights-based principles to reach the best possible decision, given past legal practice).

